FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DECISIONS

May 1983

Commission Decisions

Administrative Law Judge Decisions

Commission Decisions

The following cases were Directed for Review during the month of May:

Secretary of Labor, MSHA v. Freeman United Coal Mining Co., Docket No. LAKE 82-3 (Judge Broderick, March 25, 1983).

Minerals Exploration Company v. Secretary of Labor, MSHA, Docket No. WEST 81-189-RM (Judge Carlson, April 6, 1983).

Secretary of Labor, MSHA v. FMC Corporation, Docket Nos., WEST 82-146-RM, WEST 82-207-M (Judge Kennedy, April 1, 1983).

Southern Ohio Coal Company v. Secretary of Labor, MSHA, Docket Nos. LAKE 82-93-R, 82-94-R, 82-95-R (Judge Koutras, April 20, 1983).

William Haro v. Magma Copper Co., Docket Nos. WEST 79-49-DM, 80-116-DM (Judge Morris' certification for Interlocutory Review, April 6, 1983)

Secretary of Labor, MSHA v. Black Diamond Coal Mining Co., Docket No. SE 82-48 (Judge Koutras, April 20, 1983)

Review was Denied in the following cases during the month of May:

James Dickey v. United States Steel Co., Docket No. PENN 82-179-D (Judge Koutras, March 23, 1983).

Jay Montoya v. Valley Camp of Utah, Inc., Docket No. WEST 82-41-D (Judge Broderick, April 4, 1983).

Leo Klimczak v. General Crushed Stone, Docket No. YORK 82-21-DM, (Judge Melick, April 6, 1983).

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

May 5, 1983

WILLIAM A. HARO	:	
	:	WEST 79-49-DM
v.	:	WEST 80-116-DM
	:	
MAGMA COPPER COMPANY	:	

ORDER

The certification of interlocutory review filed by the judge on April 6, 1983 is accepted. 29 C.F.R. § 2700.74(a)

The remand order of the Commission issued on November 20, 1982 directed the judge to make findings on the record presently before him as to the merits of the operator's defense. Accordingly, the case is returned to the judge.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

May 11, 1983

UNITED MINE WORKERS OF AMERICA (UMWA)	:	
v.	:	Docket No. CENT 81-223-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	

DECISION

The broad question presented here is whether miners, or representatives of miners, have statutory authority under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1976 & Supp. V 1981) ("the Mine Act"), to initiate review of citations issued by the Secretary of Labor through the filing of a notice of contest. The administrative law judge held that miners and their representatives do not have such a right. For the reasons set forth below, we agree.

This case arose in the following context. On May 13, 1981, an inspector from the Mine Safety and Health Administration issued an imminent danger withdrawal order pursuant to section 107(a) of the Mine Act to Garland Coal & Mining Company. 30 U.S.C. § 817(a). 1/ In the withdrawal order, the inspector charged that explosives were being transported to the blasting area of the mine in a manner that constituted an imminent danger. The order alleged that the inspector had observed explosive materials being transported on the front seat and in the glove compartment of a truck.

1/ Section 107(a) provides:

> If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary

(Footnote continued)

On the same document as the imminent danger withdrawal order, the inspector also issued a citation under section 104(a) of the Mine Act. 30 U.S.C. § 814(a). 2/ The citation alleged that the manner in which the explosives were being transported constituted a violation of 30 C.F.R. § 77.1303(c). That mandatory safety standard states that "[s]ubstantial nonconductive closed containers shall be used to carry explosives, other than blasting agents to the blasting site." In addition, the citation also contained a "significant and substantial" finding. 3/

Fn. 1/ continue

> determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist. The issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110.

30 U.S.C. § 817(a).

2/ Section 104(a) provides:

> If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory, health or safety standard, rule, order, or regulation promulgated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The requirement for the issuance of a citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act.

30 U.S.C. § 814(a).

3/ With regards to significant and substantial findings, section 104(d)(1) of the Mine Act in part provides:

> If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while

(Footnote continued)

Thereafter, the United Mine Workers of America ("UMWA"), proceeding as a representative of the miners, filed a notice of contest with the Commission. In the notice of contest, the UMWA submitted that there was "sufficient evidence" to establish that the violation of 30 C.F.R. § 77.1303(c) was the result of the operator's "unwarrantable failure" to comply with the standard. See section 104(d)(1) at n.3, supra. Accordingly, the UMWA requested that the Commission modify the citation so as to include an unwarrantable failure finding. Garland Coal, the operator to which the citation and order were issued, did not contest the Secretary's action or seek to intervene in the proceeding instituted by the UMWA.

The Secretary filed a motion to dismiss the UMWA's notice of contest on the ground that the UMWA had failed to state a claim upon which relief can be granted. The Secretary argued, among other things, that an "unwarrantable failure" finding cannot be made in a citation if the involved violation is also serving as the basis for an imminent danger withdrawal order. In that regard, the Secretary stated that section 104(d)(1) provides that in order to make an unwarrantable failure finding, the inspector must first determine that the cited violation did not result in an imminent danger. Thus, the Secretary submitted that under the facts of this case the inspector was precluded from making an unwarrantable failure finding.

The UMWA, in turn, filed a motion for summary decision with the judge. It argued that the "Inspector's Statement" regarding the violation of 30 C.F.R. § 77.1303(c), together with the Mine Safety and Health Administration's "Narrative Findings for a Special [Penalty] Assessment", established that the violation resulted from the operator's unwarrantable failure to comply with the cited standard. 4/

Fn. 3/ continue

> the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act.

30 U.S.C. § 814(d)(1). (Emphasis added.)

4/ Both the inspector's statement and the narrative findings were attached to the motion for summary decision. The inspector's statement was a standardized form filled out by the inspector who had issued the citation and it addressed the cited violation. The narrative findings was a statement by the Mine Safety and Health Administration to the effect that the circumstances of the case warranted the waiving of the penalty assessment formula appearing in 30 C.F.R. § 100.3 and the determination of a "special" assessment under 30 C.F.R. § 100.4 (1981).

On August 28, 1981, the judge issued a pre-hearing order dismissing the case. 3 FMSHRC 2016 (August 1981)(ALJ). The judge based his dismissal on the ground that the UMWA, as a representative of the miners, did not have the statutory authority to contest the citation. In light of his conclusion, the judge did not pass upon the issues raised in the parties' pre-hearing motions.

Following the judge's order of dismissal, the UMWA's petition for discretionary review was granted by the Commission. 30 U.S.C. § 823(d)(2). We also granted leave to intervene to Peabody Coal Company, U.S. Steel Corporation and the Council of the Southern Mountains, Inc., and oral argument was heard.

The issue before us at the present time is extremely narrow. Although a number of potentially important questions involving the interpretation of various key provisions of the Mine Act have been raised by the parties, the sole issue ruled on by the judge and before us on review is whether miners and representatives of miners ("miners") have the statutory authority under the Mine Act to contest citations. Because we agree with the judge's disposition of the preliminary question of the UMWA's right to institute this proceeding, we need not reach or decide at this time the secondary issues raised by the parties.

The judge's conclusion that miners do not have the right to contest citations was based on the express statutory language of section 105(d) of the Act. 30 U.S.C. § 815(d). Section 105(d) sets forth certain Secretarial actions that operators and miners may contest:

> If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 104, or any miner or representative of miners notifies the Secretary of an intention to contest the issuance, modification, or termination of any order issued under section 104, or the reasonableness of the length of time set for abatement by a citation or modification thereof issued under section 104, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing ... and thereafter shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief.... The rules of procedure prescribed by the Commission shall provide affected miners or representatives of affected miners an opportunity to participate as parties to hearings under this section.

(Emphasis added.)

In sum, the above statutory language states that under section 105(d) an operator may contest (1) the issuance or modification of an order of withdrawal, (2) a citation, (3) a proposed penalty assessment, and (4) the reasonableness of the length of abatement time contained in the citation. Comparatively, miners may contest (1) the issuance, modification or termination of a section 104 withdrawal order and (2) the reasonableness of the length of abatement time contained in the citation.

Thus, as the judge noted in his order dismissing the case, "[t]he words 'or citation' are conspicuously absent from the list of items a miner or representative or miners may contest." 3 FMSHRC at 2017. Accordingly, a plain reading of the unambiguous language of 105(d) supports the conclusion that Congress did not intend for miners to have the right to contest citations. 5/

Despite the unambiguous language of section 105(d) the UMWA submits that the Mine Act's legislative history establishes that Congress in fact intended miners to have the right to contest citations. 6/ In support of this argument we are directed to the following passage in the Conference Report:

> Procedure for Enforcement
>
> The Senate bill required that, within a reasonable time after completion of the inspection, the Secretary notify the operator, by certified mail, of the proposed civil penalty to be assessed for any violation noted in the inspection. Such notice, a copy of which must be sent to the representatives of miners at the mine, would notify the operator that he had fifteen working days from receipt to contest the citation or proposed civil penalty assessment. If within 15 working days, the operator or any miner or the representative of miners did not contest the civil penalty assessment or citation, such would be the final order of the Commission, and would not be reviewable in any court.
>
> * * * * * *
>
> The conference substitute conforms to the Senate bill, with an amendment changing the period within which appeals may be taken from orders and penalty proposals from "fifteen working days" to "thirty days." The conferees intend that this shall mean 30 calendar days.

5/ Both the UMWA and intervenor Council of the Southern Mountains, Inc. note that in Energy Fuels Corp., 1 FMSHRC 299 (May 1979), we found section 105(d) to be ambiguous. However, our discussion of ambiguity in Energy Fuels was directed at the question of whether an operator may contest a citation prior to the Secretary's proposing a penalty. It is inapposite to the question presented here.

6/ In that respect, the UMWA is joined by intervenors Peabody Coal Company, U.S. Steel Corporation and the Council of the Southern Mountains, Inc.

S. Rep. 95-461, 95th Cong., 1st Sess. 50 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 1328 (1978) ["Legis. Hist."]. (Emphasis added.)

We find the UMWA's and intervenors' reliance upon this portion of the legislative history to be misplaced. This portion of the Conference Report concerns section 105(a) of the Act -- addressing the procedural scheme for when a citation and proposed penalty become a final order of the Commission -- and not section 105(d). 7/ We read section 105(a) and the corresponding legislative history contained in the Conference Report as providing that unless the operator contests the citation and/or proposed penalty within the 30-day period, and unless the miners contest the reasonableness of the length of the abatement period contained in the citation within that same time frame, the citation and proposed penalty become a Commission final order. Thus, we find that section 105(a) does not expand upon the section 105(d) rights of miners to contest specified Secretarial enforcement actions -- that is, the right to contest the issuance, modification and termination of a withdrawal order issued under section 104 and the right to challenge the length of the abatement period contained in a citation.

We find the Mine Act's legislative history relating to section 105(d) to be equally unpersuasive. Regarding section 105(d), the Conference Report states the following:

7/ Section 105(a) provides:

> If, after an inspection or investigation, the Secretary issues a citation or order under section 104, he shall, within a reasonable time after the termination of such inspection or investigation, notify the operator by certified mail of the civil penalty proposed to be assessed under section 110(a) for the violation cited and that the operator has 30 days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty. A copy of such notification shall be sent by mail to the representative of miners in such mine. If within 30 days from the receipt of the notification issued by the Secretary, the operator fails to notify the Secretary that he intends to contest the citation or the proposed assessment of penalty, and no notice is filed by any miner or representative of miners under subsection (d) of this section within such time, the citation and the proposed assessment of penalty shall be deemed a final order of the Commission and not subject to review by any court or agency. Refusal by the operator or his agent to accept certified mail containing a citation and proposed assessment of penalty under this subsection shall constitute receipt thereof within the meaning of this subsection.

30 U.S.C. § 815(a). (Emphasis added.)

> The Senate bill required that parties wishing to contest the issuance or modification of an order, or a notification, or the abatement requirement notify the Secretary of the intention to contest within 15 working days of receipt thereof. The Senate bill required that the Secretary immediately notify the Commission, which would afford the parties an opportunity for a hearing, and issue a final decision, based on findings of fact affirming, modifying or vacating the Secretary's order, citation or proposed penalty, and directing other appropriate relief. The order of the Commission would become final 30 days after its issuance. Miners or their representatives were afforded the opportunity to participate in such hearings as parties.
>
> * * * * * *
>
> The conference substitute conforms to the Senate bill, with the amendment providing 30 calendar days for the filing of administrative appeals rather than the 15 working days provided in the Senate bill.

S. Rep. 95-461, 95th Cong., 1st Sess. 53 (1977), Legis. Hist. at 1331. (Emphasis added.)

Although this portion of the Conference Report refers to "parties" contesting citations, in light of section 105(d)'s specific grant to operators, but not miners, of the right to contest citations, we find the preceding passage insufficient to establish that Congress intended to allow miners to contest citations. Instead, this portion of the Conference Report merely collectively summarizes the section 105(d) statutory rights that operators and miners have to challenge Secretarial enforcement actions. 8/

The Senate Report on S.717, the bill that substantially formed the basis for the Mine Act, is also bereft of any specific language to indicate that the Senate intended miners to have the right to contest citations. See S. Rep. 95-181, 95th Cong., 1st Sess. 34-35 (1977) ["S. Rep."], Legis. Hist. at 622-623. With regard to section 105(d), the Senate Report's section-by-section analysis states:

8/ For that same reason, we reject the UMWA's argument that Commission Rule 20(b) expressly provides for miners to contest citations. 29 C.F.R. § 2700.20(b). That procedural rule merely summarizes the various rights to contest set forth in section 105(d) of the Mine Act and quoted extensively in Commission Rule 20(a). 29 C.F.R. § 2700.20(a). Moreover, we could not, through procedural rules, expand upon the statutory rights to contest granted by Congress in section 105(d).

> Section [105(d)] provides that if an operator notifies the Secretary that he intends to contest the issuance or modification of an order or a notification, or the reasonableness of an abatement period, or any miner or representative of miners notifies the Secretary that he plans to so contest, the Secretary shall immediately so advise the Commission. The Commission must then provide an opportunity for a hearing and thereafter issue an order affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty or directing other appropriate relief. Such an order becomes final 30 days after its issuance.
>
> The rules of procedure prescribed by the Commission shall provide affected miners or their representatives an opportunity to participate as parties to Commission hearings under this subsection. The Commission shall take whatever action is necessary to expedite proceedings for hearing appeals of orders issued under section [104].

S. Rep. at 69, Legis. Hist. at 657. (Emphasis added.)

As with the Conference Report, in light of the unambiguous language of section 105(d), we view the section-by-section analysis as an inartful summary of the statutory provisions of that section. 9/

In sum, we find that a careful reading of the cited portions of the Mine Act's legislative history does not support the proposition that in section 105(d) Congress intended to confer upon miners the statutory right to contest citations. Moreover, even if we read the legislative history in the light most favorable to the UMWA's position, we do not find such Congressional intent to be so clearly expressed as to overcome the plain and unambiguous language used in section 105(d). Accordingly, we find the clear and precise language of section 105(d) to be controlling. See American Tobacco Company v. Patterson, ___ U.S. ___, 71 L.Ed. 2d 748, 755 (1982); United States v. Turkette, 452 U.S. 576, 580 (1981).

9/ In addition, a statement made by Senator Javits during the Senate floor debate on S.717, and relied upon by the UMWA, likewise fails. Senator Javits stated:

> Administrative review of challenges to these procedures is lodged in an independent Mine Safety and Health Review Commission. Any affected party may appeal a citation, penalty, or order, and the Commission is directed to hold a hearing on their claim.

Legis. Hist. at 910-911. (Emphasis added.) For the reasons mentioned above, we do not equate the phrase "[a]ny affected party may appeal a citation" with affording affected miners the right to contest a citation.

Furthermore, assuming arguendo that the Mine Act's legislative history could be read to evidence Congressional intent to confer on miners standing to contest citations, the failure of Congress to specifically incorporate such intent into the language of section 105(d) would be especially puzzling in view of the fact that the Mine Act's predecessor, the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976)(amended 1977), did not contain a specific statutory provision allowing miners or operator's to contest the merits of a notice of violation -- the Coal Act's equivalent of a citation. See 30 U.S.C. § 815(a)(1)(1976). In the Mine Act, Congress specifically gave operators the right to contest citations. One would assume, therefore, that if Congress had intended miners to also have this right, it would have at the same time specifically provided them such a right in section 105(d). 10/

In the final analysis, we confront again the assertion of a right which leads to a search of the statute to find the requisite authority. The statute contains no express provision for the asserted right. Our dissenting colleague searches elsewhere and finds implications, but no express statutory provision.

It may very well be desirable for the miner or the miner's representative to have a right to contest the issuance of a citation, but it remains the prerogative of the Congress to provide such right. It is not the prerogative of this Commission to confer that right in the absence of statutory provision. Repeated recitation of the purpose of the 1977 Act, which is well known, gives no support to an attempt to impart to the Act a provision which simply is not there.

The 1977 Act represents a thoroughgoing amendment of the 1969 Act. The basic issue in this case did not spring forth last month or last year. It finds inception in the absence of statutory provision in the 1969 Act, which forcefully begs the question: If it is so plain that the Congress intended to provide the right asserted here, why was it not clearly provided for in the 1977 Act?

Finally, we reject the claims advanced by the UMWA and intervenor Council of the Southern Mountains, Inc. that miners are denied due process and equal protection of the law by not being permitted to initiate review of citations issued by the Secretary. Regarding the due process objection, neither the UMWA, nor the Council of the Southern Mountains, has identified a "life, liberty or property" interest of which miners are being deprived in this case. The fact that Congress enacted remedial safety and health legislation does not confer upon miners a due process right to initiate a challenge to the Secretary's issuance of a citation. Moreover, due process requires only that a party

10/ Where Congress intended for miners to have an affirmative right under the Mine Act, it clearly provided for such. E.g., section 101(a)(7), 30 U.S.C. § 811(a)(7) (transfer of miners overexposed to hazardous substances); section 103(c), 30 U.S.C. § 813(c) (requiring

(Footnote continued)

be afforded an opportunity to be heard "at a meaningful time and in a meaningful manner" appropriate to the nature of the case. See Mathews v. Eldridge, 424 U.S. 319, 333 (1976); Armstrong v. Manzo, 380 U.S. 545, 552 (1965). Thus, even if we assumed the existence of a due process right of miners to be heard regarding the issuance of citations, the informal Secretarial review provisions contained in 30 C.F.R. Part 43 afford miners due process. Those informal review provisions allow miners the opportunity to explain to a representative of the Secretary why a citation should be issued.

As for the equal protection argument, we find that the UMWA and the Council of the Southern Mountains have failed to show that no rational reason exists for the manner in which Congress sought to achieve safety in the mines -- that is, by permitting operators to initiate a contest to the Secretary's issuance of a citation, but not miners. See Secretary of Labor v. Kenny Richardson, 3 FMSHRC 8, 21-27 (January 1981), aff'd, 689 F.2d 632 (6th Cir. 1982). In fact, a rational reason for the statutory scheme concerning the right to contest citations seems obvious -- Congress quite rationally may have thought it unnecessary to afford miners the right to contest the Secretary's issuance to an operator of a citation alleging a violation of the Act. Congress legitimately could have expected that operators, not miners, are adversely affected by issuance of a citation.

Fn. 10/ continued

the Secretary to adopt regulations permitting miners to observe the monitoring or measuring of toxic materials and harmful physical agents, and to have access to the records of one's own exposure); section 103(d), 30 U.S.C. § 813(d) (interested persons' access to accident reports); section 103(f), 30 U.S.C. § 813(f) (right to accompany Mine Safety and Health Administration inspector during inspection of mine, without loss of pay); section 103(g), 30 U.S.C. § 813(g) (right to request a special inspection if there is reason to believe that a violation or an imminent danger exists and right to obtain informal review if the inspector does not issue a citation or a withdrawal order); section 105(c)(3), 30 U.S.C. § 815(c)(3) (right to bring an independent action for discrimination before the Commission in the event that the Secretary declines to do so); section 107(e)(1), 30 U.S.C. § 817(e)(1) (right to seek Commission review of the Secretary's issuance, modification or termination of an imminent danger withdrawal order); section 111, 30 U.S.C. § 821 (right to seek compensation if idled as a result of a withdrawal order issued under certain sections of the Act); section 115, 30 U.S.C. § 825 (mandatory health and safety training); section 302(a), 30 U.S.C. § 862(a) (miners' access to roof control plan); section 303(d)(1), (f), (g) and (w), 30 U.S.C. § 863(d)(1), (f), (g), and (w) (interested persons' access to records of operator's safety and health examinations); and section 312(b), 30 U.S.C. § 872(b) (miners' access to confidential mine map).

Accordingly, we hold that miners and representatives of miners do not have statutory authority under section 105(d) of the Mine Act to initiate review of citations issued by the Secretary of Labor. 11/ The judge's order dismissing the UMWA's notice of contest is, therefore, affirmed.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

L. Clair Nelson, Commissioner

11/ This case does not raise, and we do not decide, any issue concerning the scope of the right of miners or their representatives under section 105(d) to participate as parties in a proceeding initiated through an operator's contest of a citation. Compare e.g., OCAW v. OSHRC, 671 F.2d 643, 647-48 (D.C. Cir. 1982), with Marshall v. Sun Petroleum Products Co., 622 F.2d 1176 (3d Cir. 1980).

Commissioner Lawson dissenting;

The majority has defined the question before us as "broad", but found the issue to be "extremely narrow". Slip. op. at 1, 4, supra. However, defined, I would hold that they have erred in finding that miners or their representatives are barred from initially contesting section 104(a) citations for reasons other than the reasonableness of abatement periods.

It is significant that the miners' representative (UMWA), and intervenors Council of the Southern Mountains, Peabody Coal Co., and U.S. Steel Corporation, all agree that the miners and their representative do have the authority under the statute to contest the citation here issued by the Secretary. Oral Arg. 49-50. I concur. 1/ The Secretary therefore stands alone in asserting that miners should be denied the right to thus participate in this implementation of the Act.

The Mine Act granted both operators and miners expanded rights to challenge citations, as contrasted to the 1969 Coal Act, which permitted challenges only as to the time period for abatement. 30 U.S.C. § 815(a)(1) (1970). The judge below and majority here premise their denial of Secretarial actions which miners may contest on--a part of--the language of section 105(d), which enumerates matters an operator may contest as:

> "the issuance or modification of an order issued under section 104, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof under section 104." Federal Mine Safety and Health Act of 1977 § 105(d), 30 U.S.C. § 815(d) (1981 Supp.).

That same section of the Act, however, also provides that miners or their representatives may contest the issuance, modification or termination of any order issued under section 104, or the reasonableness of the length of time set for abatement by a citation or modification thereof issued under section 104 (emphasis added).

From this the majority concludes that because citations and penalty assessment are included in the list of actions which operators may contest, but not mentioned in the list of actions which miners and their representatives may contest, Congress intended to deprive miners of the opportunity to challenge citations and penalty assessments.

1/ As set forth hereinafter, I take no position on the merits of the particular case before us, but would remand to the ALJ for hearing and development of the facts and determination of the other issues addressed by the parties. I would, to that extent, agree with the majority that the secondary issues (slip. op. at 4, supra), need not be addressed at this time.

However, the then majority of this Commission in the case of Energy Fuels, 1 FMSHRC 299 (May 1979), in construing section 105(d) of the Act, conceded that its language was ambiguous. 2/ As stated there:

> These ambiguities convince us that the words of the 1977 Act can not serve alone as an accurate gauge of congressional intent. We have therefore considered the legislative history of the 1977 Act, and what construction and application of the 1977 Act would best implement it.

Energy Fuels, supra at 301.

A review of that legislative history reflects the intention of the Congress that not only operators but miners are permitted to contest citations. As the Senate Report noted:

> Section 10[5](d)--provides that if an operator notifies the Secretary that he intends to contest the issuance or modification of an order or notification, or the reasonableness of an abatement period, or any miner or representative of miners notifies the Secretary that he plans to so contest, the Secretary shall immediately so advise the Commission.

S. Rep. No. 95-181, 95th Cong., 1st Sess. 69 (1977), reprinted in [1977] U.S. Code Cong. & Ad. News 3401, 3468 (emphasis added).

The Conference Report on the Act also reviewed and specifically commented on section 105:

> If within 15 working days, the operator or any miner or the representative of miners did not contest the civil penalty assessment or citations, such would be the final order of the Commission....

H. Conf. Rep. No. 95-655, 95th Cong., 1st Sess. 50 (1977) reprinted in [1977] U.S. Code Cong. & Ad. News 3485, 3498 (emphasis added).

Even analyzed negatively, as does the majority, the legislative history is silent as to any restriction of the right of miners or their representatives to contest citations, or that Congress intended miners to have less opportunity to challenge citations, or their modifications, than would operators. Nor is there any dispute that Congress rejected the 1969 Coal Act limited appeal restriction which permitted only challenges to the reasonableness of the time period set for abatement of the violation.

2/ Intervenors Peabody and U.S. Steel recognized this ambiguity also, in supporting the Mine Workers position in this case. Oral Arg. 51.

The majority's characterization of the legislative history cited "[w]e view the section by section analysis as an inartful summary of the statutory provisions of ... section [105(d)]." Slip. op. at 8, supra, and its unwarrantably confident reading of Senator Javit's remarks (n. 10, supra), fail when read in the light of the overriding purpose of the statute, and its emphasis upon the rights and obligations of both the operators and the miners "to prevent the existence of unsafe and unhealthful conditions and practices in such mines." Section 2(e).

The Commission is empowered to and should provide a hearing to allow miners to contest citations. Wong Yang Sung v. McGrath, 339 U.S. 33, 50-51 (1950). This Commission did provide the operator a review hearing of a temporary reinstatement order under section 105(c), to protect property rights, even though that section has no such provision. Sec. ex rel. Gooslin v. Kentucky Carbon Corp., 3 FMSHRC 1707, 1712 (July 1981). See also 29 C.F.R. § 2700.44.

Finally, and perhaps of overriding importance in the administration of the Mine Act, the Secretary's view, as noted, is contrary to that of all other parties to this case, and is in essence that his prosecutorial discretion is unlimited. Perhaps the most respected authority on administrative law has strongly criticized this view, and pointed out that the exercise of the discretionary power of an agency not to enforce can be of even greater concern than its power to enforce:

> Curiously, discretion not to enforce is not merely the other side of the discretion-to-enforce coin, although almost everyone, including some of the best of judges and lawyers, tend to assume that it is. Not only does discretion not to enforce necessarily mean discretion to discriminate, but it is more dangerous because it is much less controlled than the affirmative power: (1) Exercise of the negative power is usually final, not merely interim. Exercise of the affirmative power usually leads to a proceeding, with opportunity for some sort of review. (2) The negative power is commonly secret, so that extraneous influences on discretion are less likely to be detected. Affirmative enforcement is usually intrinsically open and may often be reported to the press. (3) Guiding standards or principles are more likely to be formulated for action than for inaction. (4) Findings and reasons often support enforcement decisions but seldom support discretionary decisions not to enforce. (5) A discretionary decision to enforce may be reviewed, although often it is not. But a decision not to enforce is almost never reviewed.

2 K. C. Davis, Administrative Law Treatise, 214 (2d ed. 1979). See also Sections 9:2, 9:6 at 220, 239-40, 244.

Mr. Davis points to several cases in which courts have moved away from the traditional view and have refused to allow "the phrase prosecutorial discretion to be treated as a magical incantation which automatically provides a shield for arbitrariness." Medical Committee for Human Rights v. SEC, 432 F.2d 659, 673 (D.C. Cir. 1970). In Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973), a nine-judge court unanimously affirmed a district court decision ordering the Secretary of Health Education and Welfare, and the Director of HEW's Office of Civil Rights, to institute enforcement proceedings against more than two hundred systems of higher education and school districts, and to withhold federal funds, because of violations of Title VI of the Civil Rights Act of 1964, involving school desegregation.

Further, this Commission has in the past refused to accept the Secretary's view that its prosecutorial functions were unreviewable. Old Ben Coal Co., 1 FMSHRC 1480 (October 1979). See also Phillips Uranium Corp., 4 FMSHRC 549 (April 1982). The Commission in those cases rejected the Secretary's argument that he had complete discretion as to whether to cite the mine owner or the contractor for a violation that occurred at the mine owner's site.

It is also clear, and the Secretary concedes, that the Commission is the proper forum for relief if the Secretary fails to carry out his statutory mandate. Tr. Oral Arg. at 41. Nor was the Secretary able to articulate any practical reason why miners or their representatives should be forbidden to contest citations. Tr. Oral Arg. at 46-48.

Finally, it has been noted and is clear in the legislative history of the 1977 Act, (H. Rep. 95-312 at 15; S. Rep. 95-181 at 8-9) that the Congress criticized the Secretary (then the Secretary of the Interior) for being seriously deficient in carrying out his responsibilities under the '69 Act. At oral argument, a request was made for statistics as to enforcement since the inception of the 1977 Act, some of which were subsequently furnished to the Commission. Those statistics indicate a substantial decrease in several categories of citations and orders initiated since the 1977 Act became law.

For example, section 104 citations issued between fiscal years 1979 and 1981 decreased in the Secretary's "coal" districts from 135,000 to 105,000; similarly, section 104(d) citations decreased from 840 to 764 in this same period of time, and failure to abate withdrawal orders under section 104(b) declined from 1,867 to 1,389. In the Secretary's "metal and non-metal" districts, section 104(a) citations decreased from 44,000 to 23,000; and section 104(b) failure to abate withdrawal orders declined from 301 to 179 (although section 104(d) citations did increase from 39 to 77).

Citations in coal districts on a calendar year basis declined from 139,000 in 1979 to 112,000 in 1981, and significant and substantial violations declined from 96,000 to 52,000 over the same period of time. In metal and non-metal districts, citations declined from 41,000 to 21,000, and significant and substantial violations from 37,000 to 14,000 over a similar time span.

Unfortunately, the Secretary states that MSHA does not maintain separate statistics for voluntary dismissals, i.e., dismissals that are sought by the Secretary. This, at best, therefore leaves unanswered the question of whether or not the Secretary is dismissing cases after citations are issued at a greater, lesser, or equivalent rate than has obtained in the past. The Secretary also averred that he keeps no statistics on the voluntary withdrawal or dismissal of cases brought (per district), compared to the number of enforcement actions pursued.

While these statistics are not conclusive, they do present the possibility that there is more than mere rhetoric underlying the allegations of the miners' representative and the intervenor Council of Southern Mountains that the Secretary's prosecutorial vigor has lessened. More cogently, the Secretary has averred that the Commission's standard of review must be abuse of discretion (Tr. Oral Arg. at 39), but presents the Commission with data which is insufficient for meaningful review. This is, perhaps, most evident in the claimed inability of the Secretary to supply data on cases withdrawn by him, which, together with his repetitive reliance on "prosecutorial discretion", frustrates any attempt to determine whether or not there has, indeed, been any abuse of discretion, or "pattern or practice by the Secretary in violation of his authority" (Council of Southern Mountains v. Donovan, 516 F.Supp. 955, 960 (D.D.C. 1981)), and precludes this--or any other forum's--review thereof.

The adversary system is, in my view, entitled to at least the same measure of respect as reliance on "prosecutorial discretion" and indeed presents preferable possibilities for the parties to challenge either abusive enforcement or lack of enforcement. For that reason, too, permitting the miner or miner's representative to fully participate and litigate issues such as those presented in this case appears to be far more in accord with the purpose and intent of the Act, certainly as reflected in the legislative history, than the denial to the most affected parties, the miners, of the right to review Secretarial action or inaction, even if limited to an abuse of discretion. Miners, too, must be assured that the Secretary is in compliance with the Act.

Further, there is substantial precedent construing the 1969 Act--a fortiori applicable to the 1977 Act--which holds that between two possible interpretations of the Act, the one that promotes safety must be preferred. See District 6, UMWA v. IBMA, 562 F.2d 1260, 1265 (D.C. Cir. 1977). Accord, UMWA v. Kleppe, 532 F.2d 1403, 1406 (D.C. Cir. (1976), cert. denied, 429 U.S. 858 (1976); Munsey v. Morton, 507 F.2d 1202, 1210-11 (D.C. Cir. 1974); Munsey v. FMSHRC, 595 F.2d 735 (D.C. Cir. 1978); Phillips v. IBMA, 500 F.2d 772, 782 (D.C. Cir. 1974), cert. denied, 420 U.S. 938 (1975). It follows that the interpretation of section 105(d) that best promotes safety is one that permits miner participation in citation review.

Finally, and since section 105(d) does not specifically preclude a miner's contest of a citation, interpreting that section as conferring such a right would be consistent with the remedial enforcement scheme of the Mine Act, and foreclose the "imbalance in the Act's enforcement scheme" feared by the judge below. As we noted in Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 633 F.2d 1211 (3d Cir. 1981):

> In determining whether section 105(c)(1) protects Pasula's refusal to work, we considered it important that the 1977 Mine Act was drafted to encourage miners to assist and participate in its enforcement.

Thus, for the reasons set forth, I dissent and would remand this case to the judge below.

A. E. Lawson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

May 12, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. LAKE 81-106-RM LAKE 81-171-M
WHITE PINE COPPER DIVISION, COPPER RANGE COMPANY	:	

DECISION

This penalty case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1976 & Supp. V 1981)("the Mine Act"). It involves 30 C.F.R. § 57.3-20, which in part states, "Ground support shall be used if the operating experience of the mine, or any particular area of the mine, indicates that it is required." White Pine Copper Division, Copper Range Company ("White Pine") was issued a citation under section 104(a) of the Mine Act for an alleged violation of this metal/nonmetal standard. 30 U.S.C. § 814(a).

The citation was issued because mining was being performed under unsupported roof in Unit 56 of the White Pine mine. Unit 56 has a roof composed of massive sandstone. It is White Pine's position that the massive sandstone roof in that unit does not require supplemental roof support such as roof bolts. Accordingly, White Pine began to mine a demonstration drift in Unit 56 in which it intended to roof bolt only as required (i.e., "as needed") by the particular roof conditions. In the remainder of the mine, White Pine continued its practice of uniform roof bolting. The citation involved in this case was issued in the bolting "as needed" demonstration drift.

The administrative law judge held that White Pine violated section 57.3-20 and he assessed a penalty of $250. 1/ The judge based his finding of a violation on two grounds. The first ground was that the condition of the unsupported roof in the particular area of the mine cited -- the demonstration drift -- required roof support. 3 FMSHRC at 2787. The second ground was that the "operating experience" of the White Pine mine also required roof support in the cited area, specifically uniform roof bolting. 3 FMSHRC at 2789.

1/ The judge's decision is reported at 3 FMSHRC 2782 (December 1981)(ALJ).

We granted White Pine's petition for discretionary review and heard oral argument. 2/ For the reasons that appear below, we affirm the judge's finding of a violation. Our affirmance, however, is based solely on the first ground--that the condition of the mine roof in the cited demonstration drift required roof support. We do not concur in the judge's holding that the "operating experience" of the White Pine mine specifically required uniform roof bolting in that area.

We begin our discussion of this case with an historical overview of White Pine's mining operation. Preliminarily, we note that White Pine operates an underground copper mine approximately nine square miles in size. It extracts the copper ore from the ore body by room and pillar mining. 3/ Accordingly, as part of the mining process, White Pine utilizes pillars of ore as the primary means of roof support. Also, in mining by the room and pillar method White Pine generally employs one of two types of mining configurations. The first type is "full column" mining. Full column mining involves mining through the upper sandstone. It has a roof composed of shale strata, described as "laminated layers". The second type of mining configuration is "parting shale" mining. Parting shale mining utilizes the sandstone found in certain parts of the mine as both the mine roof and floor. 4/

2/ White Pine sought review of the judge's finding of violation only. It did not seek review of the penalty assessment.

3/ "Room and pillar" mining is explained in part as:

> A system of mining in which the distinguishing feature is the winning of 50 percent or more of the coal or ore in the first working. The coal or ore is mined in rooms separated by narrow ribs or pillars. The coal or ore in the pillars is won by subsequent working, in which the roof is caved in successive blocks. The first working in rooms is an advancing, and the winning of the rib (pillar) a retreating method.

A Dictionary of Mining, Mineral and Related Terms, U.S. Department of the Interior (1968).

4/ With regard to White Pine's use of different mining configurations, the miners' representative, United Steelworkers of America (Steelworkers"), notes that "White Pine does not mine into a massive ore body ... where only one type of ground condition is encountered ... [instead,] White Pine follows an ore-bearing strata in which a multitude of ground conditions are encountered." Steelworkers' Br. at 2. Also, with respect to the particular mining configuration to be used, White Pine states:

> The mining horizon is determined by the resulting grade of ore that will be generated. The Geology Department makes the initial determination based upon diamond drill

(Footnote continued)

Parting shale mining: The mid-1950's to the early 1960's

White Pine began underground mining operations during the mid-1950's. From approximately the mid-1950's to the early 1960's, it engaged in parting shale mining. Albert Ozanich, the company Safety Director, stated that during the 1950's the normal mining cycle involved "primarily drilling, blasting, mucking ... and some roof bolting." Vol. II, Tr. 51. Ozanich testified that the sandstone roof was supported by pillars of ore and "[s]upplemental support was done by roof bolting in some areas where they encountered a small fault or if the back [i.e., the roof] was burned through upper drilling." Vol. II, Tr. 52. He added that White Pine would occasionally go back and bolt the "old workings" as necessary and, further, that he believed that the main entries to the mine were roof bolted several years after they were mined. Ozanich also testified that parting shale mining, with roof bolting only "as needed", was a practice that was continued at the White Pine mine into the early 1960's.

David Charles, White Pine's Acting General Foreman, and Julio Thaler, its Mining General Superintendent, similarly testified that from the mid-1950's to the early 1960's White Pine did not uniformly roof bolt. Both witnesses stated that the decision as to whether or not to roof bolt was left to the unit foreman. Charles noted, "Roof bolts were installed but generally as time and manpower permitted, behind the active front." Vol. II, Tr. 70. He estimated that the length of the unbolted roof ranged from 150 to 300 feet. In addition, Charles stated that uniform roof bolting was performed when the production unit advanced under less competent sandstone, but that bolting only "as needed" was resumed when the production unit moved under massive sandstone. 5/

Fn. 4/ continued

> borings. Vol. II, Tr. 3435. These diamond drill borings enable geologists to determine the thickness of the upper sandstone which is noncopper bearing strata. Vol. II, Tr. 34. Using diamond drill core samples, the Geology Department is able to plot the relative thickness of the upper strata to determine where the sandstone is so thick that it dilutes the ore grade to the point that parting shale mining should be performed to maximize ore grade. Vol. II, Tr. 3436.

White Pine Br. at 2.

5/ In preparation for the hearing in this case, Charles inspected "a substantial portion of the early mine workings around the main portal where parting shale mining was done. On the basis of that inspection, Charles prepared Exhibits 0-7 through 0-10, marking in red all the parting shale areas that were not roof bolted. On review, White Pine maintains that Exhibits 0-7 through 0-10 "show significantly large areas where mining without roof bolts occurred in all directions" and that those unbolted and otherwise unsupported areas "still stand".

Thaler likewise testified that during the time in question, White Pine would "very often" advance headings 150 feet to 200 feet without roof bolting. He stated that the headings were roof bolted "as manpower was available, and often times, they just were not bolted." Vol. III, Tr. 6. Thaler also stated, "Often times, we stopped a shift by putting the bolter in, and they would bolt the entire stretch." Vol. III, Tr. 6-7.

The Steelworkers called several miners as witnesses who testified that during the 1950's it was the practice at the mine not to work under unbolted roof. Some of the miners testified, however, that they had either worked under unbolted roof at times, or had observed other miners working under unbolted roof.

The judge specifically found that uniform roof bolting was not practiced by White Pine during the 1950's. He also found that 60% to 70% of the area mined during that period was roof bolted. 3 FMSHRC at 2784.

Full column mining: The early 1960's

In the early 1960's, White Pine changed from parting shale mining to full column mining. 6/ Thus, it mined through the upper sandstone and had a roof composed of shale. Julio Thaler, the Mining General Superintendent, testified that it was at that time that White Pine began to uniformly roof bolt as part of the mining cycle. He stated that 4-foot and 6-foot mechanical roof bolts were installed on 4-foot centers in the shale roof. 7/ David Charles, the Acting General Foreman, testified that "[i]n full column you will blast, muck and then bolt." Vol. II, Tr. 73 (Emphasis added). Throughout the 1960's White Pine continued to use the full column mining configuration and it continued to uniformly roof bolt.

Return to parting shale mining

In 1977, White Pine began mining Unit 56 of its mine using the parting shale configuration. White Pine chose to mine Unit 56 by the parting shale configuration because of the massive sandstone found there. (As noted earlier, parting shale mining utilizes the sandstone as the roof.) 8/ Roof support in the form of 4-foot and 6-foot mechanical roof bolts on 4-foot centers, earlier adopted in full column mining, was continued as part of the mining cycle in Unit 56.

6/ White Pine continued to mine by the room and pillar method. It changed only the mining configuration.

7/ Mechanical roof bolts are anchored in the rock strata. White Pine states that in full column mining the lengths of the mechanical roof bolts changed from a uniform 4-foot length to alternating lengths of 4- and 7-feet, to 4- and 6-foot lengths. Except for Unit 56 of the mine, all areas of the mine presently use uniform 4-foot resin roof bolts that, in effect, are cemented into the rock strata.

8/ White Pine continued to use the full column configuration in the remainder of its mine.

In 1979, White Pine changed its bolting practice in Unit 56 from the 4- and 6-foot mechanical roof bolts on 4-foot centers to 4-foot mechanical roof bolts on 4-foot centers. It continued the practice of uniformly bolting the sandstone roof in that unit. White Pine's Mining General Superintendent testified that the practice of uniformly roof bolting was continued in Unit 56 only as a matter of "habit". He stated that the roof was uniformly bolted despite the fact that "we were getting back to parting shale mining where we have a very thick copper sandstone back [i.e., roof], so we are getting back to the similar conditions that we experienced in the early part of the White Pine mine." Vol. III, Tr. 41. It was under those earlier experienced conditions (the mid-1950's to the early 1960's) that White Pine maintains that the roof was bolted on an "as needed" basis only.

The Unit 56 demonstration project

In 1980, White Pine decided to mine Unit 56 without uniformly roof bolting. It believed that uniformly bolting the massive sandstone roof found in that unit was unnecessary. 9/ Instead, White Pine sought to bolt Unit 56 only "as needed" by the particular condition of the mine roof. In order to support its claim that the sandstone roof does not require uniform roof bolting, White Pine initiated a demonstration project. White Pine sought to demonstrate to the Mine Safety and Health Administration ("MSHA") and to the Steelworkers that bolting the massive sandstone roof in Unit 56 only "as needed" rather than uniformly was a safe and lawful mining practice. White Pine's Mining General Superintendent explained:

> [W]e developed a two-phase program, primarily to demonstrate and convince the Union and MSHA that mining without bolts in parting shale mining was a viable method worth doing. The first phase was to outline an area that was previously bolted with four-foot mechanical bolts and begin at one end and retreat and remove the bolts and measure convergence [i.e., the movement of the mine roof]. Following successful completion of that phase, our plans were to go to the active mining front and begin advancing the single drift without bolts under very close monitor, and again, it was a demonstration system to demonstrate to MSHA and the Union and to our employees that it is a safe method.

Vol. III, Tr. 12. 10/

9/ At oral argument, counsel for White Pine stated that White Pine was not arguing that uniform roof bolting is unnecessary in full column mining.

10/ William Carlson, the director of MSHA's Marquette, Michigan, subdistrict office testified that he was informed by White Pine (in February of 1980) that it intended to conduct a roof bolt removal evaluation project in Unit 56. Carlson also testified that he understood from White Pine that it would begin to mine Unit 56 without uniform roof bolting if the bolt removal test indicated that the unbolted roof was stable.

On February 4, 1980, White Pine initiated the first phase of its Unit 56 demonstration project -- the removal of the roof bolts from an earlier worked-out portion of that unit. The roof bolts were removed by White Pine foremen. Also, the newly unbolted roof was monitored by White Pine personnel for convergence (i.e., movement). 11/

On February 19, 1980, the roof bolt removal phase was halted when an MSHA inspector issued a withdrawal order under section 107(a) of the Mine Act. 30 U.S.C. § 817(a). The withdrawal order charged that the removal of the roof bolts constituted an imminent danger. At the time that the order was issued, the bolt removal phase was approximately 80% completed. Following a successful challenge by White Pine to the imminent danger withdrawal order (White Pine Copper Division, 3 FMSHRC 211 (January 1981)(ALJ)), the Unit 56 roof bolt removal demonstration phase was resumed on February 13, 1981.

11/ White Pine submits that a device known as an "extensometer" can measure downward roof movement to plus or minus .001 inch. White Pine explained its method for monitoring convergence as follows:

> Closely associated with the development of convergence monitoring has been the use of convergence lights and dial gauges in production mining.... The light and gauge are mounted on a spring operated device with two extending poles which reach from the floor to the mine roof. The light can be set so that a few thousandths of an inch of roof movement will cause contact on the electrical connection in the light to occur turning the light on. Such movement warns the miner of early movement in the mine roof which could be indicative of developing instability. The dial gauge, when used simultaneously with the light, will measure the total convergence or total movement of the roof over a period of time. It is the increase in the rate of convergence over time ... that warns both the miner and the ground control technician of potential instability before visible signs occur. Vol. III, Tr. 74-75. Under standard current mining practices, convergence lights are only used with drilling operations at the face. Roof bolting operations use both the convergence light and the convergence dial gauge. [Fn. omitted.] Vol. III, Tr. 26-28.

White Pine Br. at 6 (White Pine's emphasis). The Secretary also offered the following explanation regarding convergence monitoring:

> Convergence monitoring is a recorded history of movement of the roof in a mine which is used to determine whether a roof has become stabilized or is accelerating towards failure. Measurements are made periodically between permanently anchored reference points in the roof and floor. Such data is then graphed and used to predict the future movement of the roof. Vol. I, Tr. 107.

Secretary's Br. at 5 n.4. In addition, an expert witness testifying on behalf of the Secretary stated that White Pine is a "good practitioner" of the art of roof monitoring. Vol. I, Tr. 89.

With regard to the results of the roof bolt removal phase, White Pine's Director of Mines, Planning and Engineering stated that over 90% of the roof bolts removed "did absolutely nothing." He described the roof bolts in the Unit 56 massive sandstone as "thumb tacks on a bulletin board" and concluded that "[t]he ultimate results of that bolt removal did confirm our suspicions that the bolts that were functioning did act primarily in pure suspension." Vol. III, Tr. 77. Roof falls ranging from "a couple of inches up to two feet" did, however, occur in the northern ("faulty") area of the bolt removal site. 12/

On February 27, 1981, White Pine began the second phase of its demonstration project by mining a drift in Unit 56 without uniformly roof bolting. White Pine also did not use any other type of supplemental roof support (e.g., steel sets and cedar posts). Instead, it intended to bolt the massive sandstone roof found in that unit only "as needed" by the particular condition of the mine roof.

White Pine's Safety Director, Albert Ozanich, described Unit 56 as having "basically the same" sandstone composition as the area of the mine worked in the mid-1950's. 13/ With respect to the particular area of Unit 56 where the demonstration drift was mined, Joseph Maher (White Pine's Director of Mines, Planning and Engineering) testified:

> The area that we selected in Unit 56 to attempt to demonstrate [that] our limited bolting concept was a viable roof support method, we selected a drift that had a massive sandstone roof.... [T]he no bolt [mining] demonstration area, as it compares to the [demonstration] area we unbolted is probably better because the sandstone ... is thicker. It has a very smooth, well-pronounced parting, well-defined parting at the base of the sandstone, so it generates a very smooth roof. It's very similar in its character to the roof in the southern development of our area that we unbolted, which was in a way,

12/ White Pine's assessment of the roof bolt removal demonstration phase was to some extent disputed by William Letzens, the Secretary's expert witness. Letzens, an MSHA engineer, stated that he did not believe that White Pine totally expected the roof fall in the northern part of the bolt removal demonstration area. Letzens also stated, however, that the southern part of the demonstration area appeared stable after the roof bolts were removed.

13/ A White Pine geologist also testified that Unit 56 seems to be massive sandstone throughout "the whole thickness" and that except for the northeast portion, there are no shale partings (i.e., breaks in the sandstone). He added that it is "unlikely" that a massive sandstone roof that is not interrupted by joints or cracks would break off and fall. An expert witness on the subject of roof control similarly testified on behalf of White Pine that it was "most unlikely" in thick and massive sandstone for slabs of roof to fall.

> very good sandstone. Now, because the sandstone there was five and a half or six feet thick, we knew that sandstone in the no bolt [mining] area is nine or nine and a half feet thick. I would say that it's a better roof.

Vol. III, Tr. 82-83 (Emphasis added).

White Pine used both convergence lights and dial gauges to monitor the movement of the roof in the bolting "as needed" demonstration drift. It was in this demonstration drift that the MSHA inspector issued the citation that is the subject of this case. The circumstances surrounding the issuance of the citation are discussed below.

The Inspection

On March 3, 1981, an MSHA inspector conducted an inspection of Unit 56. The inspector was accompanied by two miners' representatives and a White Pine safety engineer. The inspector first proceeded to the North 103 drift, then to the North 101 drift, and from there to the North 98 drift. Each of those drifts in Unit 56 was uniformly roof bolted with 4-foot mechanical bolts on 4-foot centers. From the North 98 drift, the inspector proceeded to the West 57 drift. There, he noticed a sign that read, "Demonstration Area No Bolt Area."

In the no bolt (i.e., bolting only "as required" by roof conditions) demonstration drift the inspector observed that approximately 32 feet of the roof was unbolted. 14/ That 32 feet of roof was the distance from the working face to the last row of roof bolts in the drift. This indicated to the inspector that more than one mining cycle had been completed under unbolted roof. 15/ He stated that generally, bolts should be no farther than 4 feet from the face.

While in the demonstration drift, the inspector heard a "popping" and "snapping" noise in the unbolted roof. He also observed that some "loose material" had fallen from a three-foot diameter area of the roof where he had heard the noise. In addition, the inspector further observed a "slip" or a "crack" in the unbolted roof. The slip was approximately 27 feet in length, with an "oily substance" around the edge. It began about five feet in front of the bolted portion of the roof and extended diagonally toward the working face.

The inspector subsequently issued a citation alleging a violation of 30 C.F.R. § 57.3-20. The citation read:

14/ As earlier noted, the demonstration area was also unsupported by any other type of roof support.

15/ A mining cycle at the White Pine mine normally advances the unit 10 feet.

> Roof support was not provided in N-94 and W-53 intersection in Unit 56. Prior operating experience of the mine indicates that roof support is required. Miners were/had been working under the unsupported roof.

(Emphasis added.) 16/ Although the citation referred to the "[p]rior operating experience of the mine" only, the case was tried by the parties on both that theory and the theory that the condition of the mine roof in the demonstration drift also required roof support. See 3 FMSHRC at 2786.

(1) The condition of the mine roof in the bolting "as needed" demonstration drift

We hold that substantial evidence supports the judge's decision that the condition of the mine roof in the Unit 56 demonstration drift required roof support. As already noted, the inspector testified that he heard a "popping" and "snapping" noise in the unbolted roof and that "loose material" had fallen from a three-foot diameter area of the roof where the noise was heard. Those conditions indicated to the inspector that the unsupported roof of the demonstration drift was "unsafe" and that there was a "possibility" of a roof fall. The inspector stated, "Movement, noise, that's the warnings for when there is loose material going to fall." Vol. I, Tr. 28. He described the "loose material" as:

> ... a brown granular material, which meant to me that there could be a parting up there, which is a seam in the sandstone, which in my opinion, their backs [i.e., the roof] was only as good as the six or eight inches of seam there.

Vol. I, Tr. 30.

William Letzens, the MSHA engineer and expert witness, testified that noise in the roof "normally" indicates that there is an unusual roof condition. He also testified that pieces of loose material falling from the roof further indicates that there is "substantial movement" in the roof and that a portion of the roof is "in a small state of failure". Vol. I, Tr. 91-92. 17/ Letzens also stated that the popping and snapping

16/ The N-94 and W-53 intersection was the only area of Unit 56 that the inspector found to be unbolted.

17/ In that regard, Letzens stated:

> Well, whenever a mine roof makes a noise, it might represent a redistribution of stress and a relaxation of the roof, a sag of the roof, or it might represent physical movement of the roof to such an extent that there could be a failure of the roof.

Vol. I, Tr. 76.

noise indicates that the roof is "potentially unstable". He admitted, though, that a further evaluation of the roof would be required. 18/

In addition, Albert Goodreau, the White Pine safety engineer who accompanied the inspector likewise testified that he heard "some cracking and popping" in an area of the unbolted roof that measured 2-feet by 3-feet. He also observed loose material on the mine floor measuring "[u]p to an inch maybe" and approximately 4 to 5 inches in diameter. Vol. II, Tr. 114-15, 120-21. Edward Hocking, one of the miners' representatives who was with the inspector in the demonstration drift, described the roof fall as consisting of "small flakes". He stated that the biggest piece was approximately "four-by-six" and "[m]aybe an inch thick, maybe weigh[ing] three or four pounds, if that." Hocking estimated that the loose material fell from a height of 11 feet. Vol. IV, Tr. 48, 55.

There was, however, testimony that the unsupported roof was safe and that roof bolts were not required. Goodreau stated that except for the area of the roof where the loose material developed and the line of discoloration that the inspector believed was a slip, the roof of the demonstration drift "looked good." Joseph Maher (White Pine's Director of Mines, Planning and Engineering) and Jack Parker (a self-employed roof consultant and expert witness testifying on behalf of White Pine) concurred in Goodreau's observation as to the general stability of the unit. Maher additionally testified that popping and cracking noises are normal underground occurrences and are not necessarily indicative of roof instability. He also stated that "loose" in the roof can result from several causes and can occur in either bolted or unbolted roof.

Furthermore, with respect to the convergence data obtained through the monitoring of the demonstration drift roof, Maher testified that the unbolted roof exhibited "stable characteristics". In that regard, Maher stated that the bolted and unbolted roof in the cited drift behaved similarly. William Letzens, the Secretary's expert witness, did not review the convergence data collected from the bolting "as needed" demonstration drift.

On balance, we hold that the testimony of the MSHA inspector, together with the testimony of William Letzens (the MSHA engineer), Albert Goodreau (the company safety engineer) and Edward Hocking (the miners' representative) regarding the popping and snapping sounds in the unbolted roof and the fall of loose material constitute substantial evidence supporting the judge's finding of a violation of 30 C.F.R. § 57.3-20. The fact that the roof fall was not extensive in terms of the amount of loose material that fell, or the area of unbolted and otherwise unsupported roof involved, does not alter the fact that, as the judge found,

18/ Letzens did not personally observe the unbolted demonstration drift roof. Because of that fact, he was unable to state that the roof was not stable. The thrust of Letzens' testimony on that point, however, concerned the presence of the slip in the demonstration drift and not the fall of loose material.

roof support was required in the area cited by the inspector. 19/ We are unpersuaded by White Pine's argument that the fact that the inspector proceeded under the unbolted portion of the demonstration drift roof established that roof support was not needed. Whether the inspector walked under the unbolted roof is irrelevant to the question of whether roof support was required.

Although we affirm the judge's decision on the preceding basis, we next address the broad question that is presented in this case. That question is whether the judge was correct in holding that the "operating experience" of the White Pine mine required uniform roof bolting in the Unit 56 demonstration drift. Because of the importance of that question to both White Pine and the miners, 20/ and because as the facts of this case suggest, it is a question that is likely to recur, we believe that some Commission guidance as to what constitutes "operating experience" is necessary.

(2) The "operating experience" of the White Pine mine

The judge held that the "operating experience" of the White Pine mine requires uniform roof bolting in the Unit 56 demonstration drift. 3 FMSHRC at 2789. He stated that the "most relevant evidence" regarding the mine's operating experience is White Pine's "uninterrupted 20 year history of uniform roof bolting." 3 FMSHRC at 2788. 21/ On the basis of that 20-year period, the judge concluded that "the pertinent operating history of the mine requires the use of roof bolts in all areas of the mine." 3 FMSHRC at 2788-89. 22/ For the reasons that follow, we disagree with this conclusion of the judge.

19/ Regarding this first issue, we note that the judge held only that roof support was required. Unlike the issue involving White Pine's "operating experience," the judge did not specify what type of roof support was required. We concur in the judge's treatment of this issue. The only question before the Commission is whether the particular conditions of the cited area required roof support, not which type of roof support.

20/ The Steelworkers note in their brief on review that the issue as to White Pine's operating experience "has all White Pine underground miners' attention awaiting its resolve." Steelworkers Br. at 1.

21/ The judge's reference is to White Pine's mining practice in the 1960's and 1970's. He afforded White Pine's practice in the 1950's "little weight." 3 FMSHRC at 2789.

22/ The Steelworkers join the Secretary in arguing that the judge's holding is correct. On review, however, the Steelworkers appear to suggest that they might be agreeable to working under unsupported roof in parting shale mining if White Pine develops "a plausible and feasible standard operating procedure." Steelworkers' Br. at 5-6. See Oral Arg. Tr. 70-71.

First, we hold that the judge erred in taking into account White Pine's past practice in full column mining for the purpose of determining its "operating history" in this case. Here, the parting shale mining configuration was being used in the Unit 56 demonstration drift. Because parting shale mining utilizes the upper sandstone as the roof and because full column mining involves mining through the upper sandstone and has a roof composed of shale strata, we conclude that only White Pine's past practice in parting shale mining is relevant in determining its operating history under massive sandstone roof.

Second, we hold that the judge also erred in determining White Pine's "operating experience" solely on the basis of its prior operating history and not present day experience. While we do not at this time seek to precisely define the contours of the term "operating experience", in view of the fact that section 57.3-20 is intended to protect miners against roof falls, we conclude that a mine's "operating experience" broadly encompasses all relevant facts tending to show the condition of the mine roof in question and whether, in light of the roof condition, roof support is necessary. 23/

Thus, in addition to White Pine's past practice in parting shale mining, other relevant considerations in this case are the results of White Pine's roof bolt removal demonstration project that took place in an earlier worked-out portion of Unit 56, as well as its convergence monitoring results showing the rate of the movement of the roof in the

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23/ We note that the term "operating experience" is not defined in 30 C.F.R. § 57.3-20. In that regard, section 57.3-20 states only that, "Ground support shall be used if the operating experience of the mine ... indicates that it is required." (Emphasis added.) The rule-making background of section 57.3-20 also fails to indicate what the Secretary of the Interior intended "operating experience" to mean when that standard was promulgated under the former Federal Metal and Non-metallic Mine Safety Act. 30 U.S.C. § 721 et seq. (1976)(amended 1977). Also, the term "operating experience" is not defined elsewhere in section 57.3 (titled, "Ground control"). Accordingly, we turn to the dictionary for the common usage of that term. There, the key word "experience" is defined:

> 2: direct observation of or participation in events: an encountering, undergoing, or living through things in general as they take place in the course of time ... 4: knowledge, skill, or practice derived from direct observation or participation in events: practical wisdom resulting from what one has encountered, undergone, or lived through ... 5a: the sum total of the conscious events that make up an individual life ... 6: something personally encountered, undergone, or lived through....

Webster's Third New International Dictionary 800 (unabridged 1971) (Emphasis added).

bolting "as needed" demonstration drift. 24/ The integrity of this sandstone as a roof material should also have been addressed more fully. 25/ In addition, the effect of the depth of the mine upon the sandstone roof, the width of the mine entries and the dimensions of the pillars of ore left standing to support the mine roof would also be pertinent considerations.

Third, even assuming that the "operating experience" of the White Pine mine requires the use of roof support, we disagree with the judge's conclusion that White Pine must forever continue to uniformly roof bolt throughout its entire mine, Unit 56 included. 3 FMSHRC at 2789. Section 57.3-20 provides that if roof support is in fact required, it "shall be consistent with the nature of the ground and the mining method used." Accordingly, under the terms of section 57.3-20, where roof support is necessary White Pine is free to select the specific method of roof support to be used, subject only to the restriction that it be consistent with the nature of the roof and mining method being used and is sufficient to accomplish the purpose of the standard, i.e., the protection of miners from roof falls. Thus, section 57.3-20 does not lock White Pine into uniformly roof bolting in parting shale mining in the Unit 56 demonstration drift simply because it uniformly roof bolted in parting shale mining in the past. Instead, assuming that the operating experience of the mine requires the use of roof support, White Pine has the opportunity to develop and to implement another type of roof control method, so long as that method protects miners against roof falls as contemplated by section 57.3-20. 26/

Our holding therefore is that substantial evidence supports the judge's finding of a violation of 30 C.F.R. § 57.3-20 insofar as it is based upon the "popping" and "snapping" sound in the unsupported roof of the Unit 56 demonstration drift and the fall of loose material from that area.

24/ Although the judge in fact took the roof bolt removal and convergence monitoring results into account, he accorded those results "little weight" because White Pine failed to show that mining without uniform roof bolting is "as safe as" mining with uniform roof bolting. 3 FMSHRC at 2788. That portion of the judge's decision is discussed, infra.

25/ In that regard, an expert witness testifying on behalf of White Pine stated that sandstone is a "good rock" with a comprehensive strength of approximately 15,000 PSI (i.e., four times stronger than concrete) and that it is more resistant to changes in the weather than shales and soapstones. Also, White Pine's Mining General Superintendent testified that in the past the massive sandstone roof has converged as much as "three or four feet" due to pillar deterioration without the main roof failing.

26/ Similarly, we note that the first issue in this case involved the question as to whether the particular conditions of the cited Unit 56 demonstration drift required roof support. It did not involve the question as to what specific type of roof support was required. See n.19, supra.

We reject the judge's holding that the operating experience of the White Pine mine requires uniform roof bolting throughout the entire mine and, in particular, in the Unit 56 demonstration drift. While we do not in this case define the term "operating experience," we conclude that the operating experience of a mine requires the use of roof support if, in a given situation, the mining conditions are such that roof support is necessary. This determination takes into account the operating history of the mine (i.e., its past mining practice) geological conditions, scientific test or monitoring data and any other relevant facts tending to show the condition of the mine roof in question and whether in light of those factors roof support is required in order to protect the miners from a potential roof fall.

Accordingly, for the foregoing reasons the judge's finding of a violation is affirmed. 27/

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

L. Clair Nelson, Commissioner

27/ Contentions of the parties not discussed herein have been fully considered and to the extent that they are inconsistent with this decision are rejected.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 25, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket Nos. WEST 81-213-RM
v.	:	WEST 81-258-M
GREAT WESTERN ELECTRIC COMPANY	:	

DECISION

This case involves a contest of citation and a civil penalty proceeding brought under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1976 & Supp. V 1981). The administrative law judge concluded that Great Western Electric Company violated 30 C.F.R. § 57.15-5 (1980) and assessed a civil penalty. 1/ 4 FMSHRC 1645 (September 1982) (ALJ). The major issues before the Commission are whether the judge erred in his interpretation of the standard and, if not, whether his conclusions are supported by substantial evidence. For the reasons that follow, we affirm the judge's decision.

On March 4, 1981, during an inspection of the FMC Mine in Green River, Wyoming, an MSHA inspector observed a miner installing a light fixture from a ladder without the use of a safety belt and line. The inspector issued a combined section 104(a) citation and a section 107(a) imminent danger order of withdrawal. 2/ In order to terminate the citation and order, the miner was brought down and told to wear a safety belt and line.

1/ 30 C.F.R. § 57.15-5 provides in pertinent part:

> Safety belts and lines shall be worn when men work where there is danger of falling....

2/ Citation and Order of Withdrawal No. 0576985 alleges:

> [A]n employee of Great Western Electric Company was observed working off a ladder 18 to 20 feet from the floor. [The] employee was installing a light fixture about 4 feet above head level. [The] employee did not have a safety belt and line on. This was in the one distribution building at W2102 screen level.

At the hearing, the parties stipulated to specific facts and procedures that would govern the case. They stipulated that the Commission has jurisdiction over the controversy. They stipulated that the employee of Great Western, a construction worker, was on a ladder 12 feet above the ground and was not wearing a safety belt and/or line. The parties agreed that the body of the miner was not totally within the rails of the ladder; specifically, his shoulders were not within the rails of the ladder. The miner's arms were outstretched toward a light fixture and both of his hands were involved with installing the light fixture. Three photographic exhibits were submitted to show the approximate position of the miner on the ladder. 3/ To the extent that the exhibits depicted a different position, the stipulations of the parties were to govern the facts. The parties agreed that the miner was skilled and experienced in the use of ladders, that he used a ladder everyday, as many as twenty different times per day, and that a significant amount of his daily work was performed on a ladder. The ladder was secured at both the top and the bottom. The parties accepted the accuracy of MSHA's penalty proposal. They also agreed that if a violation of the Act sufficient to support the section 104(a) citation were found, then the section 107(a) order of withdrawal would also stand and the proposed penalty would be paid. 4/

In his decision, the judge found that Great Western violated 30 C.F.R. § 57.15-5 and assessed a penalty of $60. The judge determined that the pivotal issue in the case was whether there was a danger of falling and he concluded that such a danger existed. In addressing the correct test for determining whether this broad standard had been violated, he relied upon the application of an "objective 'reasonable' test". 4 FMSHRC at 1647. More specifically, the judge articulated a "conscientious safety expert" test, requiring that identification of a hazard be determined in light of common industry practices and that the precautions taken against a known hazard be those which a conscientious safety expert would take. 4 FMSHRC at 1647-48. The judge held that the skill of a miner is not a factor in determining whether a danger of falling exists, but stated that skill could be a factor in assessing a penalty as it would relate to the operator's negligence. 4 FMSHRC at 1649. On review, Great Western argues that the skill of a miner is a relevant factor in determining whether there is a danger of falling and that the stipulated facts do not support the judge's conclusion that there was such a danger.

We first address the judge's discussion regarding the correct test to be applied for determining whether 30 C.F.R. § 57.15-5 was violated. In Alabama By-Products Corp., 4 FMSHRC 2128 (December 1982), the Commission interpreted a general standard by applying a "reasonably prudent person" test, stating:

> ...[W]e conclude that the alleged violation is appropriately measured against the standard of whether a reasonably prudent person familiar

3/ The exhibits depict a man on a ladder using both hands to hold an industrial light fixture. One of his arms is between the upper two rungs of the ladder and around a vertical rail.

4/ In light of this stipulation, no issue concerning whether the condition constituted an imminent danger under section 107(a) is before us.

> with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation.

Id. at 2129. This approach was likewise followed in U.S. Steel Corp., 5 FMSHRC 3 (January 1983), where we held that the adequacy of an operator's efforts to comply with a general standard should be evaluated by reference to an objective standard of a reasonably prudent person familiar with the mining industry and the protective purpose of the standard. Id. at 5. We conclude that the same interpretive course is appropriate in the present case. Applying this construction to the standard before us defines the applicability of the standard in terms of whether an informed, reasonably prudent person would recognize a danger of falling warranting the wearing of safety belts and lines.

The administrative law judge's decision in this case was issued prior to our decisions in Alabama By-Products and U.S. Steel. The judge applied a version of the reasonably prudent person test to the standard, but his test incorporated a higher threshold, that of a conscientious safety expert. Although the test applied by the judge differed from that articulated by the Commission, applying the law to the facts, as we do below, leads us to conclude that the judge's use of a conscientious safety expert test constituted harmless error because substantial evidence supports the judge's finding of a violation under the Commission's less stringent test.

Great Western argues that the skill of a miner is a relevant factor in determining whether there is a danger of falling because the miner's skill defines the scope of the hazard presented. We find that such a subjective approach ignores the inherent vagaries of human behavior. Even a skilled employee may suffer a lapse of attentiveness, either from fatigue or environmental distractions, which could result in a fall. The specific purpose of 30 C.F.R. § 57.15-5 is the prevention of dangerous falls. Kerr-McGee Corp., 3 FMSHRC 2496, 2497 (November 1981). By adopting an objective interpretation of the standard and requiring a positive means of protection whenever a danger of falling exists, even a skilled miner is protected from injury. We believe that this approach reflects the proper interpretation and application of this safety standard.

That is not to say that the miner's skill is totally immaterial. The skill of a miner may be a relevant factor in determining an appropriate civil penalty for a violation. In making work assignments and giving instructions to its employees, the amount of reliance which an operator places on the relative skills of its employees may be an indication of the operator's negligence concerning the violation. A miner's skill may also influence the probability of the occurrence of the event against which a standard is directed, and so affect that element of gravity. 5/

5/ The parties stipulated to the appropriateness of the proposed penalty if a violation were found. Therefore, we find no error in the judge's penalty assessment.

At the hearing, the parties elected to submit the case based upon stipulated facts. In arriving at his findings of fact and conclusions of law, the administrative law judge relied on the stipulations presented to him by the parties. 4 FMSHRC at 1646. It is undisputed that the miner in question was 12 feet above the ground and was not wearing a safety belt and/or line, although he could have been tied off. The miner's shoulders were outside the uprights of the ladder, arms outstretched, with both hands involved with installing the light fixture. The photographic exhibits indicate the size of the fixture involved.

We conclude that, under the reasonable person test appropriately applied to the standard, substantial evidence supports the judge's finding of a danger of falling and a violation. The miner was standing on a ladder, his physical center of gravity was shifted to one side and both of his hands were preoccupied with installing a large light fixture. A slight shift in balance or lapse of attention might have resulted in a fall. In that event, the miner would not have been protected. His position twelve feet above the ground presented a substantial height from which to fall.

By our decision, we do not hold that on every occasion when a miner works from or travels on a ladder he must be secured by a safety belt and line. If this is the Secretary's intended approach in addressing all falling hazards associated with the use of ladders, proper notice to the industry would be necessary before such a wide-ranging change in industrial work practices could be imposed.

Accordingly, we affirm the judge's decision. 6/

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank J. Jestrab, Commissioner

A. E. Lawson, Commissioner

6/ Commissioner Nelson did not participate in the consideration or disposition of this case.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 26, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. KENT 80-292
SHAMROCK COAL COMPANY	:	

DECISION

This civil penalty case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1976 & Supp. V 1981), and involves two alleged violations of a roof control standard for underground coal mines, 30 C.F.R. § 75.200. 1/ The administrative law judge held that the operator, Shamrock Coal Company, violated the standard and assessed penalties. 2/ We granted review of Shamrock's petition for discretionary review on the issue of whether the operator violated its roof control plan, and thus the cited standard, by failing to (1) install appropriate roof support, and (2) drill a test hole. For the reasons that follow, we affirm in part and reverse in part.

1/ The standard provides in pertinent part:

Section 75.200 Roof control programs and plans.

[STATUTORY PROVISIONS]

> Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. A roof control plan and revisions thereof suitable to the roof conditions and mining system of each coal mine and approved by the Secretary shall be adopted and set out in printed form.... The plan shall show the type of support and spacing approved by the Secretary. Such plan shall be reviewed periodically, at least every 6 months by the Secretary, taking into consideration any falls of roof or ribs or inadequacy of support of roof or ribs.

2/ The judge's decision is reported at 3 FMSHRC 1858 (July 1981)(ALJ).

On October 30, 1979, a roof fall at Shamrock's No. 18 underground coal mine in Clay County, Kentucky, resulted in the death of Shamrock's second-shift foreman, Floyd D. Burke. After an investigation, a Mine Safety and Health Administration inspector issued a citation alleging two violations of section 75.200. The citation stated:

> The roof control plan was not being complied with in that additional support such as timber or cribs was not being used along with metal straps where abnormal conditions were encountered in the No. 4 entry of 005 section, and a test hole was not drilled.

Shamrock has a "full bolting" roof control plan. In addition to roof bolts, the plan also requires conventional support (e.g., crossbars, posts, etc.) under some circumstances. The pertinent provisions of Shamrock's roof control plan state:

> Crossbars to be used when pots, slips, horsebacks or hillseams are encountered. A minimum of 2 crossbars to be used at each location. At least one post to be used under each end of the crossbars and the posts are not to be more than 14 feet apart. Crossbars to be installed on 4-foot centers, and the foreman in charge shall determine when the installation of crossbars is to be discontinued.
>
> Steel straps pre-drilled on not more than 4-foot centers and installed with roof bolts on not more than 4-foot centers may be used in lieu of wood crossbars, as stated above, in areas where the roof structure is of such nature that it will provide adequate anchorage for roof bolts.
>
> In areas where steel straps have been utilized in lieu of wood crossbars where abnormal roof conditions are encountered, the area shall be supported with cribs, and/or posts set on 4-foot centers on each side of a 16-foot wide roadway.

Safety Precautions For Full Bolting and Combination Plans

> 1. This is the minimum roof control plan and was formulated for normal roof conditions and the mining system(s) described. When subnormal roof conditions are encountered, indicated or anticipated, additional roof support such as longer and/or additional roof bolts, posts, or crossbars, shall be installed.
>
> * * * *
>
> 12. During each production shift at least one roof-bolt hole in each active working place shall be drilled to a depth of at least 12 inches above the anchorage horizon of the bolts being used....

The roof fall occurred in the roof in the No. 4 entry. Prior to the accident, that roof was supported by 36-inch conventional roof bolts on four foot centers, and by 10 to 12 metal straps secured by additional roof bolts. These metal straps covered four hillseams, or cracks, in that entry. 3/ The entry was 20 feet wide in the immediate fall area. Shamrock installed the roof bolts and supplementary metal straps during the day shift immediately preceding the accident. As was its normal practice, it did not install any cribs or posts in the area prior to the accident, although it set them afterwards to permit recovery.

There were numerous cracks and hillseams throughout the mine and in the fall area. Hillseams were more likely to be encountered and to pose a hazard the closer an entry was to the outcrop. 4/ The accident area was approximately 100 feet from the outcrop boundary. Three or four small falls had previously occurred in the accident area near the outcrop. There was disagreement as to the condition of the roof in the immediate accident area and the hazards posed by hillseams. Where roof control in the mine was difficult or impossible, Shamrock usually declined to mine, or abandoned, those entries.

On the shift before the accident, James Napier, the day-shift foreman, observed the hillseams in the No. 4 entry. Toward the end of his shift, he instructed a roof bolter to drill a test hole in the entry, at what was later the accident site, to determine the extent of the hillseams. That test hole apparently was not drilled because the bolter had no drill steel. Whether a test hole in the No. 4 entry was drilled during the earlier part of the day shift is a major factual question in this case. (From the beginning of the second shift to the time of the accident, it is undisputed that no test hole was drilled.)

At about 2:50 p.m., Napier also sounded the roof in the entry with a hammer (about 30 to 32 inches of the immediate roof could be sounded), and determined to his satisfaction that it was solid. At the end of his shift, Napier informed Burke, the second shift foreman, of the hillseams, but neither recommended particular action nor mentioned his order to drill the test hole. He warned Burke, however, "to watch that night and be careful."

3/ There was some disagreement at the hearing as to the exact definition of a "hillseam." Everyone agreed that, basically, it is a crack in the roof, often filled with earth or mud. Some witnesses described it as a crack extending all the way to the surface. See also Dixie Fuel Co., 7 IBMA 71, 76-77 n. 3 (1976).

4/ An outcrop is defined as the "part of a rock formation that appears on the surface of the ground." Bureau of Mines, U.S. Department of the Interior, A Dictionary of Mining, Mineral, and Related Terms 778 (1968) ("DMMRT").

The day shift had advanced the No. 4 entry about 70 feet from the beginning to the end of the shift. The second shift advanced approximately an additional 20 feet to the accident site. The accident occurred about 2-1/2 hours into the second shift, during normal mining operations, and without significant prior warning. As the continuous miner operator and the shuttle car operator loaded out a shuttle car of coal from the crosscut, they noticed mud and loose rock falling from the roof. Almost immediately the roof fell, killing Burke instantly. The area of the roof fall was approximately 20 feet wide, 40 feet long, and 20 to 36 inches thick. The fallen mass weighed about 100 to 150 tons, and covered most of the intersection of the entry and crosscut where it occurred.

The judge found two violations of section 75.200. First, he concluded that Shamrock violated its roof control plan because it continued to mine in the presence of abnormal conditions, i.e., hillseams, without using the type of roof support required by its plan under such conditions. Second, he concluded that Shamrock failed to drill a test hole in the No. 4 entry during the day shift as required by its plan. We affirm the judge as to the roof support violation, but reverse as to the alleged test hole violation.

The roof support violation

On review, Shamrock repeats arguments previously made before the judge. The operator stipulates that the roof in No. 4 entry was supported solely by roof bolts and metal straps secured by additional roof bolts. Shamrock argues that its roof control plan requires cribs and posts to supplement metal straps only where miners encounter abnormal conditions. Because, in Shamrock's view, hillseams are not per se abnormal conditions and because these particular hillseams were not abnormal, its failure to use cribs and posts did not violate the plan.

It is clear that the first paragraph of the plan quoted above requires the use of crossbars supported by posts when "pots, slips, horsebacks, or hillseams are encountered." 5/ It is also clear that the second paragraph permits the use of metal straps secured by roof bolts as an alternative means of support, in lieu of the crossbars permitted by the first paragraph, when any of the conditions listed in the first paragraph are encountered. The parties do not dispute the meaning

5/ A pot is defined as a round piece of shale separated from the rest of the roof by a crack. Tr. 68; DMMRT 850. Slips and horsebacks are defined as joints or faults in the roof, which may be slippery and likely to fall. Tr. 68-69; DMMRT 1027. See also definitions of kettle bottom (often a synomyn for slip or horseback): "A smooth rounded piece of rock, cylindrical in shape which may drop out of the roof of a mine without warning and sometimes causing injuries to miners"; and seam: "A joint, cleft, or fissure." DMMRT 609, 976. See n. 4 for definition of a hillseam. The inspector testified that all these conditions were "abnormalities." Tr. 32-33, 68-69, 70-71. This evidence and these accepted definitions indicate that hillseams and the other listed conditions are generally regarded as abnormal roof conditions in mining.

of these two paragraphs. Rather, the dispute centers on the third paragraph. "In areas where steel straps have been utilized in lieu of wood crossbars where abnormal roof conditions are encountered, the area shall be supported with cribs, and/or posts set on 4-foot centers on each side of a 16-foot wide roadway."

The judge rejected Shamrock's interpretation of the third paragraph. He construed the paragraph as requiring the supplemental use of cribs and posts whenever the second paragraph's metal strap alternative is utilized. He thus reasoned that the "abnormal conditions" referred to in the third paragraph are synonymous with the "pots, slips, horsebacks, or hillseams" referred to in the first paragraph. Stated otherwise, he concluded that hillseams are "abnormal" or "subnormal" conditions within the meaning of Shamrock's plan. He further determined, relying in large part on the testimony of the inspector and Napier, that these particular hillseams in the No. 4 entry were abnormal.

Under his construction of the plan and the evidence presented, the judge concluded that Shamrock "fail[ed] to comply with the ... plan by using steel straps to support the roof without supplemental cribs and posts being utilized." 3 FMSHRC at 1868-69. He also found, however, that there was not enough space to use cribs and posts while the continuous miner and the shuttle car were working in the cited area. He expressed the opinion that Shamrock could either have used crossbars instead of the metal straps, or declined to mine the area. Because the operator did neither, the judge concluded it had violated its roof control plan, and thus the cited standard. 3 FMSHRC at 1865-67. We agree with the judge that Shamrock violated its plan, but we do not endorse all of the judge's reasoning.

We first construe the requirements of Shamrock's plan. We agree with the judge's determination that the third paragraph refers back to the first two and is to be read in conjunction with them. Read together, the three paragraphs require that when abnormal conditions such as hillseams are encountered, either crossbars or metal straps are to be used, but if the straps are used they must be supplemented by cribs and/or posts. Thus, hillseams and the other listed conditions are "abnormal" or "subnormal" roof conditions within the meaning of the plan. The plan uses the term "abnormal" in a qualitative not quantitative sense, and does not distinguish between serious and less serious roof abnormalities. In sum, regardless of the frequency or varying seriousness of hillseams in the mine, the plan requires the installation of the support indicated above when the hillseams are encountered.

The foregoing construction is consistent with the plan's purpose, structure, and grammar. The plan makes clear that it is a "minimum roof control plan" and that when "subnormal" roof conditions are encountered, "additional roof support ... shall be installed." The interpretation adopted by the judge, and affirmed by us, furthers this purpose. The sequential arrangement of the three paragraphs and their internal cross-references also support reading them as an interrelated whole. As the

judge correctly reasoned, because the crucial phrase in the third paragraph ("where steel straps have been utilized in lieu of the wood crossbars where abnormal roof conditions are encountered") has a comma only after the final word "encountered," the phrase must be read as a unit. It is merely a reference back to the first two paragraphs and does not add new qualifications. Finally, as noted above, the testimony in this case and accepted definitions show that conditions like hillseams and pots are regarded as roof abnormalities, and we reject Shamrock's contentions to the contrary.

Applying the above construction of the plan to these facts, we first note Shamrock's concession that it did not provide cribs and/or posts to supplement the metal straps. The evidence overwhelmingly supports a finding that hillseams were encountered. The testimony of Napier, the day-shift foreman who was concerned about the hillseams, is decisive on this point. Because the hillseams were encountered and the metal strap alternative was used, the plan required supplementation by cribs and/or posts. In addition, Napier's actions--his sounding of the top, his ordering of the test hole, and his warning to Burke--all indicated his concern that these particular hillseams in the fall area were potentially dangerous. Shamrock offered no credible evidence in rebuttal. We also note that the No. 4 entry was near the outcrop, where hillseams were potentially most dangerous, and that other roof falls had occurred nearby.

We agree with the judge that the evidence shows there was not enough space to use cribs in the same area as the continuous miner, but we disagree with his statement that crossbars were a feasible alternative. The first paragraph of the plan requires that crossbars be supported by posts no more than 14 feet apart. Thus, the crossbars arguably would present the same problem posed by the cribs. The third paragraph, however, allows the supplemental use of posts alone as an alternative to cribs. Contrary to the judge's rather general statements with regard to "cribs and/or posts," the evidence does not clearly show that supplemental posts on each side of a 16-foot roadway would have rendered continuous mining impossible. Thus, it may have been possible to supplement the metal straps with posts alone, as authorized by the third paragraph. We need not resolve that question. The operator did not try to use posts, and if it found its approved and adopted plan to be impractical, it could either have sought revision of the plan or declined to mine the area in question. Shamrock explored none of these alternatives and instead departed from the requirements of its plan. We therefore affirm the judge's conclusion that Shamrock violated the standard by failing to comply with its plan. 6/

6/ We merely construe Shamrock's plan, although we note that it may well have certain practical defects. For example, the plan does not distinguish between dangerous and minor hillseams, etc., but requires the designated support whenever these conditions are encountered. The plan also does not acknowledge practical difficulties of using certain types of support. The sole issue before us is whether Shamrock complied with its plan, not the plan's intrinsic merits. As noted above, Shamrock could have sought revision of the plan. We also note that the issue in this case is not whether extra or different support would have prevented the accident, but whether the plan was followed.

The test hole violation

The judge determined that because the cited area, the No. 4 entry, was inby an active working place on the first shift, Shamrock's roof control plan required a test hole to be drilled in the No. 4 entry during that shift. 7/ He found that the test hole ordered by Napier toward the end of the first shift was not drilled. The judge, however, did not satisfactorily resolve the question of whether a test hole was drilled anytime during the day shift, i.e., whether a test hole had been drilled earlier in the day shift at some location in the No. 4 entry other than the immediate fall area. 3 FMSHRC at 1861, 1863-64.

Shamrock's plan requires: "During each production shift at least one roof bolt hole in each active working place shall be drilled...." The plan is unambiguous on its face, and the parties do not question its meaning. We therefore interpret the plan to require that, in an active working place as here (3 FMSRHC at 1863), Shamrock was required to drill at least one test hole "throughout the continuance or course of" or "at some point in the course of" the day shift. Webster's Third New International Dictionary 703 (1971). The plan does not specify where in the working place, or when during the shift, the test hole must be drilled, and thus grants the operator considerable flexibility in testing. Hence, drilling a test hole anywhere in the active working place, the No. 4 entry, during the day shift would have satisfied the plan.

The question before us is factual. The Secretary did not establish Shamrock's failure to drill a test hole anywhere along the 70 feet of the No. 4 entry advanced during the day shift. Before the judge, the Secretary's evidence pertained only to the immediate fall area. See Tr. 38-39, 43-45, 161-62. We reject the Secretary's unsupported assertion that Shamrock's employees checked the entire entry and could find no test hole; the evidence shows only that there was no test hole in the immediate fall area. We also reject the Secretary's speculative argument that, because the roof bolter had no drill steel at the end of the shift, he also had none earlier and could not have drilled a test hole. Given the Secretary's failure to establish a prima facie case, Shamrock was under no obligation to prove it actually drilled a test hole. Consequently, while the evidence supports

7/ The citation did not specify on which shift the alleged violation occurred. The judge accepted Shamrock's argument that there could be no violation for any failure to drill a test hole on the second shift because the plan merely required a test hole "during" each production shift, and it was conceivable that the operator could have drilled a hole sometime during the remaining five hours of the second shift. 3 FMSHRC at 1863. We concur. (The Secretary does not dispute that determination, but argues only that Shamrock failed to drill a test hole on the first shift).

the judge's finding that no test hole was drilled in the immediate fall area, we conclude that substantial evidence fails to support a finding that no test hole was drilled anywhere in the active working place during the first shift. 8/

Accordingly, on the bases discussed above, we affirm the judge's determination that Shamrock violated its roof control plan and thus the standard by failing to provide appropriate roof support in the presence of abnormal roof conditions. We reverse the judge's conclusion that the operator violated its plan by failing to drill a test hole in the No. 4 entry during the first shift, and vacate the $750 penalty assessed for that violation.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

L. Clair Nelson, Commissioner

8/ We note that, on grounds remarkably similar to those articulated in this decision, a Commission judge recently vacated a citation alleging that Shamrock failed to drill a test hole at another of its mines. Shamrock Coal Co., 4 FMSHRC 2037 (November 1982)(ALJ). Similar, or identical, test hole plan provisions were in effect. The judge concluded:

> It seems clear to me that on the facts of this case the inspector issued the citation [during his inspection on the second shift] because he found no test hole had been drilled on the first shift. He and the second shift foreman looked for the hole in an area where it would normally have been drilled. They apparently did not look at the area where the first shift foreman stated it was located.

4 FMSHRC at 2041 (emphasis added). The Secretary must either require more specificity in Shamrock's plan as to exactly when and where test holes will be drilled, or must inspect more thoroughly for indications of test holes.

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Administrative Law Judge Decisions

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MAY 4 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. WEVA 83-41 A.O. No. 46-05793-03503
v.	:	Mine No. 14
WESTERN COAL CORPORATION, Respondent	:	

DECISION

Statement of the Case

These proceedings concern civil penalty proposals filed by the petitioner against the respondent pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking civil penalty assessments for five alleged violations of certain mandatory safety standards promulgated pursuant to the Act.

Respondent filed a timely answer contesting the proposed assessments, and pursuant to notice the matter was scheduled for hearing in Logan, West Virginia, May 11, 1983. However, by motion filed April 15, 1983, pursuant to Commission Rule 30, 29 CFR 2700.30, the parties seek approval of a proposed settlement of the matter. The citations, initial assessments, and the proposed settlement amounts are as follows:

Citation No.	Date	30 CFR Section	Assessment	Settlement
907844	12/8/81	50.10	$ 644	$ 112
907845	12/8/81	50.12	644	112
907845	12/8/81	77.1607(b)	259	250
907846	12/8/81	77.1605(b)	192	98
907847	12/8/81	77.1104	126	126
			$1865	$ 707

Discussion

In support of the proposed settlement, counsel for the petitioner states that she and respondent's counsel have discussed the six statutory civil penalty criteria found in section 110(i) of the Act. With regard

to Citation No. 907844, counsel states that it was issued because the respondent failed to notify MSHA of a nonfatal truck haulage accident that occurred on December 7, 1981. Counsel asserts that a further investigation has revealed that a reduction in the assessed civil penalty would be appropriate in that the gravity of the violation should be reduced to show that there was no likelihood that an event posing a risk of injury or illness would have occurred as a result of this violation. Additionally, counsel points out that the respondent's negligence should be reduced from reckless disregard to low negligence in that the respondent did in fact prepare a report for MSHA on the day of the nonfatal accident. However, the report was not officially received in the district MSHA office until the following morning because the respondent was under the impression that it had in fact complied with the regulation by filling out the report on the day of the incident. Counsel indicates that the inspector has deleted the "significant and substantial" finding in order to reflect low negligence and to show that an injury or illness was not reasonably likely to occur if the violation was not corrected.

With regard to Citation No. 907845, counsel states that it was issued because the respondent had not taken measures to prevent the altering of the scene of the December 7, 1981 accident in that the scraping of the road resulted in the removal of tire tracks, and the lectro haul truck had been removed from the scene of the accident. Counsel asserts that a reduction in penalty would be appropriate as a result of further investigation which indicates that the gravity of the violation should be reduced to show that there was no likelihood that an event posint a risk of injury or illness would have occurred as a result of this violation. Additionally, counsel asserts that the respondent's negligence should be reduced from reckless disregard to low negligence in that it had altered the scene of the accident because a fuel truck had been involved and damaged, and the respondent wanted to prevent any further danger or incident from occurring. By removing the truck, the site was unintentionally changed, and in view of these subsequent findings, the inspector deleted his "significant and substantial" finding.

Regarding Citation No. 907846, counsel asserts that it was issued because the truck driver of the lectro haul truck failed to maintain control of the truck in that it hit a fuel truck on a radius curve causing a nonfatal injury to the driver. Counsel states that the respondent's negligence was moderate in that the driver had been instructed by the respondent on how to maintain control of the vehicle, but due to excessive speed, a collision occurred.

With respect to Citation No. 907847, counsel stated that it was issued because the parking brake on the fuel truck was inoperative. Counsel argues that a reduction in penalty would be appropriate in light of a further investigation which indicates that the driver of the truck revealed that he discovered that the parking brake had become

inoperative at the beginning of the shift, but he did not report it to management or to a mechanic, nor did he record it in the daily inspection book as he had been trained by the respondent to do whenever the brakes became inoperative. Under the circumstances, counsel states that mine management had absolutely no knowledge of this condition, had no means for ascertaining this information prior to the inspector's observation of the condition, and had in fact taken reasonable steps during the training of the driver to avoid such a condition. Additionally, this condition was not present during the prior shift, and thus had not been recorded on the previous shift. Counsel concludes that the respondent's negligence should be reduced from moderate to very low, indicating that the respondent could not have known of this condition, but that the gravity of the violation was accurately assessed as reasonably likely in that injuries resulting in lost workdays or restricted duty to two miners could have occurred.

Finally, petitioner's counsel states that Citation No. 907848 was issued because materials such as diesel fuel were present on the tank and bed of the fuel truck. Counsel states further that the violation was originally assessed at $126, that the respondent has agreed to pay the penalty in full, that one miner would be affected by any injury, but that the respondent's negligence was low.

Petitioner's counsel has also submitted information reflecting that the respondent is a medium-to-small operator, that all of the citations were abated within the time fixed by the inspectors who issued them, and except for five prior citations of section 77.1104, and three for section 77.1605(b), the respondent has no history of prior citations for infractions of the other standards which were cited in this case.

After careful consideration of the arguments presented by counsel in support of the proposed settlement, I conclude and find that they support the proposed reductions in civil penalties as noted. However, with regard to Citation No. 907844, charging the respondent with a violation of section 50.10, Title 30 CFR, I take note of the fact that section 50.10 requires a mine operator to immediately contact the appropriate MSHA district or subdistrict office in the event of an "accident" as defined at section 50.2(h)(1) through (h)(12). If contact with these local MSHA offices cannot be made, the regulation requires immediate contact with MSHA's Washington, D.C. office by a toll free telephone call to the number listed therein.

I find nothing in section 50.10 that requires a mine operator to fill out a written form or to otherwise notify MSHA of an accident by submitting something in writing. Under the circumstances, I fail to understand the relevance of petitioner's assertion that a penalty reduction is warranted simply because thr respondent prepared a report the day of the accident but did not file it until the next day because of its belief that it was in compliance when it filled out the report the day of the accident. The clear language of the cited standard requires an "immediate contact" with MSHA, and not the preparation or filing of any written report.

On the facts of this case, it seems obvious to me that the respondent failed to immediately contact MSHA as required by the cited section 50.10. As a matter of fact, in its answer to the petitioner's proposal for assessment of civil penalty for this violation, respondent "admits this violation and accepts the penalty assessed". In addition, I take note of the fact that even though the inspector who issued the citation stated on the face of his citation form that the respondent "failed to notify MSHA", in the termination notice issued by another inspector abating the violation, he stated that "MSHA has been notified on the proper forms, according to Part 50.10, 30 CFR". Thus, it would appear to me that this inspector believed section 50.10 required a written report, and that fact is what is relevant insofar as mitigating circumstances are concerned. In short, if an inspector believes that section 50.10 requires a written report to achieve compliance, then a mine operator should be able to rely on that representation in arguing that it too believed it. More importantly, for purposes of future application, as between these same parties, I suggest that petitioner's counsel take the necessary steps to insure that both the inspector and the mine operator are clear as to precisely what section 50.10 requires a mine operator to do when there is an accident at its mine.

Conclusion

After careful review and consideration of the pleadings, arguments, and submissions in support of the motion to approve the proposed settlement of this case, I conclude and find that the proposed settlement disposition is reasonable and in the public interest. Accordingly, pursuant to 29 CFR 2700.30, the motion IS GRANTED and the settlement IS APPROVED.

ORDER

Respondent IS ORDERED to pay civil penalties in the settlement amounts shown above in satisfaction of the citations in question, and payment is to be made within thirty (30) days of the date of this decision and order. Upon receipt of payment by the petitioner, these proceeding is dismissed. The scheduled hearing is cancelled.

George A. Koutras
Administrative Law Judge

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MAY 9 1983

DANNY HENDERSON, Complainant	:	Complaint of Discrimination
	:	Docket No. SE 82-62-D
v.	:	
KING COAL COMPANY, Respondent	:	

DECISION

Appearances: Frederick T. Kuykendall, III, Esquire, Cooper, Mitch and Crawford, Birmingham, Alabama, for the complainant; Richard O. Brown, Esquire, Constangy, Brooks & Smith, Birmingham, Alabama, for the respondent.

Before: Judge Koutras

Statement of the Proceeding

This matter concerns a discrimination complaint filed by the complainant Danny Henderson pursuant to Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977. Mr. Henderson is a miner employed by the respondent at the subject mine and he also serves as president of his local UMWA union. The complaint was initially filed pro se after Mr. Henderson was advised by the Secretary of Labor, Mine Safety and Health Administration, (hereinafter MSHA), that its investigation of his complaint disclosed no discrimination against him by the respondent. Mr. Henderson subsequently retained counsel to represent him, and pursuant to notice a hearing was convened in Birmingham, Alabama, on February 2, 1983, and the parties appeared and participated fully therein. Post-hearing briefs were filed by the parties and the arguments advanced in support of their respective positions have been fully reviewed and considered by me in the course of this decision.

The Complaint

The complaint filed by Mr. Henderson in this case concerns an assertion by him that the respondent violated the anti-discrimination provisions of the Act when mine management decided to idle the mine for several days. As a result of this action, Mr. Henderson claims that since he was scheduled to work during all or part of this period that the mine was idled, the action

taken by mine management has resulted in his loss of pay. In addition, Mr. Henderson claims that the idling of the mine was a decision made by management to prevent or somehow inhibit the miners working at the mine from exercising their safety rights on matters concerning the work place.

Issues

The issue presented in this case is whether the decision by mine management to idle the mine in question was made in retaliation for miners exercising any protected rights under the Act, and whether that decision was motivated by management's desire to inhibit or otherwise interfere with the right of miners in the exercise of any protected rights under the Act. Although Mr. Henderson's complaint was in the nature of a "class action" on behalf of a number of miners who signed a "petition" affixed to his complaint, my pretrial rulings limited my adjudication of this case to the question of whether Mr. Henderson's rights under the Act may have been violated. Additional issues raised by the parties are identified and discussed in the course of this decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 301 et seq.

2. Sections 105(c)(1), (2) and (3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815(c)(1), (2) and (3).

3. Commission Rules, 29 CFR 2700.1, et seq.

Complainant's testimony and evidence

Danny Henderson confirmed that he is employed by the respondent as a bulldozer operator and serves as president of UMWA Local 1865. He confirmed that on Wednesday, April 21, 1982, he was at work removing overburden behind the dragline in an area known as "the pit", and he indicated that his work location at that time was "where the drill is and where the dragline is soon to be" (Tr. 27). He fixed the location of the dragline in relation to where the shots were being loaded as 900 feet away from the shot area (Tr. 38). He confirmed that he was not working on Friday, April 23, because he was at an arbitration hearing in Birmingham. He was scheduled to work on Saturday, April 24, but when he reported to the mine a security guard informed him that the mine had been idled. He observed the position of the dragline that day, and it was in the same location as it was on Thursday (Tr. 39). He was not scheduled to work Sunday, and did not work Monday because he was not called to come to work and the mine was still idle. He believed that partial crews were called back Monday, but that full production did not resume until 4:00 or 4:30 p.m. Monday or Tuesday (Tr. 40).

Mr. Henderson stated that on Tuesday, April 27, respondent's Vice-President and Manager Lynn Strickland requested a meeting with him and the safety committee concerning the event of the previous Thursday and Friday.

Mr. Strickland did not advise those in attendance as to why he had ordered the mine idled, and stated that if "the problem we had with that 103" came up again he would idle the mine again until an inspector arrived. When asked how he took that statement, Mr. Henderson replied "if we got into the habit of filing 103s and we couldn't get an inspector, we would be idled until one came" (Tr. 41).

Mr. Henderson confirmed that at no time while he was working at the pit area on Wednesday or Thursday, was he ever exposed to any hazardous or excessive dust (Tr. 42). He confirmed that the entire mining operation was idled on Friday, including reclamation work going on three quarters of a mile or a mile from the pit, welders working in the shop area approximately 4 mines from the pit, and the dragline itself (Tr. 43). Referring to a chart labeled "exhibit C-1", Mr. Henderson identified these areas, and he confirmed that prior to and after April 21, the dragline had operated closer to where shots were being fired than the 900 feet where it was located at the time in question. He confirmed that as of February 1, 1983, the dragline was located approximately "27 to 29 steps" from where a shot was put off, and he paced the distance off himself. However, he confirmed that the dragline did not operate all day since it was down for repairs (Tr. 48).

On cross-examination, and in response to a question as to why he believed the respondent's action in idling the mine has adversely impacted on the miners' safety rights, Mr. Henderson replied "if you're in the habit of getting idled if you exercise your safety rights, you would soon learn that you are going to lose money by doing it, not to do it, some peopled would" (Tr. 49). Mr. Henderson confirmed that he lost three work days, namely Saturday, Monday and Tuesday, and he believed that five employees came back to work on Monday, and full production resumed on Tuesday (Tr. 51). He also confirmed that he is an alternate member of the mine safety committee (Tr. 52).

Mr. Henderson stated that he estimated the 900 feet distance concerning the location of the dragline on Thursday, and that when he next observed it on Saturday it had not moved far, but believed it was closer to the shot area "by one day's tripping" (Tr. 56(a)). He confirmed that he was paid by the union for attending union business on Friday, and that he was called to come back to work at the mine either on the following Tuesday or Wednesday (Tr. 58).

With regard to the meeting with Mr. Strickland, Mr. Henderson stated that Mr. Strickland said nothing about the dragline being too close to the loaded shot, and Mr. Henderson confirmed that he was not working around the dragline or the drills on Wednesday and Thursday, April 21 and 22 (Tr. 60). He also confirmed that on the occasions when the dragline was closer to loaded shots than it was on Friday or Saturday, the mine was never idled, and he did not believe he was in any danger when he did work where the shots were fired on Thursday, and it is normal procedure to move away from the area where shots are fired (Tr. 62).

With regard to the shot which was loaded and fired on February 1, 1983, Mr. Henderson confirmed that he had no actual knowledge of how that shot was wired and shot, nor does he know whether the wiring and shot were accomplished "in an unsual manner" (Tr. 63). He also confirmed he actually met with Mr. Strickland on Tuesday, April 27, and that was a scheduled work day, and his actual lost days of work were only two days (Tr. 65).

Ronald Smith, testified that he has worked for the respondent for over seven years, that he is a certified Shooter, and that he was performing these duties on Wednesday, April 21, 1982. He described his duties that day, including the loading of shots after the holes are drilled by someone else. He stated that he was familiar with the Reed and Joy Drills, and he confirmed that on April 21, he requested other work due to the dust conditions, but that he did not request a section 103(g) inspection (Tr. 90). He did not work the next day, but returned to work Friday at 7:00 a.m., and the shot pattern had been drilled and he prepared to load the shots. However, he was instructed to load the holes which had been drilled with the Reed Drill, and since they were dusty he asked to see the safety committee for the purpose of requesting a section 103(g) inspection. He was later advised that no MSHA inspector was available to come to the mine, and he was given other work. At that time the dragline was some 800 feet from the loaded shot area (Tr. 92). Later that day, he was informed that the mine had been idled, and he was told to report back to work the following Monday, and he did so (Tr. 95). During the intervening weekend, the dust problems were negated by the rain, but the shot was fired on Monday when he returned to work (Tr. 95).

Mr. Smith confirmed that he was at the safety committee meeting held with Mr. Strickland on Tuesday, April 27, and he stated that Mr. Strickland stated that he had idled the mine because he could not put the shot off (Tr. 97). He also confirmed that the dragline has since operated closer to the shot, and in his opinion, no one would be in danger if it were operating within 500 feet of the shot (Tr. 98).

Mr. Smith explained the drilling operation, the loading operation, and he explained the reasons for the presence of dust during these operations. He confirmed that approximately a month after April 26, 1982, he did in fact file a request for a section 103(g) inspection, and that MSHA investigated the alleged dust problem and its ruling was not in his favor. Since that time he has filed no other requests for section 103(g) inspections (Tr. 106).

Mr. Smith confirmed that the mine conditions on April 21 and 23 were "unusual" in that there was an "abnormally high wind", and while the respondent furnished him with a respirator, he did not wear it because he doesn't like them (Tr. 108,109). He confirmed that he had a respirator when he refused to work in the dust, but opted not to wear it and chose to request a section 103(g) inspection instead (Tr. 111).

Mr. Smith confirmed that during the time the most recent shot was loaded, the dragline was located some 100 feet of the shot on February 1, 1983 (Tr. 115). He believed that was an unusual situation because the dragline was down and it could not be turned in a direction away from the shot (Tr. 115). Although he believed personnel were safe during this shot since everyone was removed from the pit, he did not believe that the equipment was safe because of the close proximity to the shot (Tr. 116). He confirmed that equipment has been damaged in the past by shots, but he could not recall how close to the shot the equipment was located (Tr. 118).

Mr. Smith confirmed that the respondent has never been cited by MSHA for being out of compliance with the applicable dust standard (Tr. 127). When asked whether Mr. Strickland had ever told him that he had decided to idle the mine because someone had filed a section 103(g) complaint, Mr. Smith testified as follows (Tr. 129-132):

> A. He said that when we -- first of all he said he was disappointed in the Safety Committee because they did not file a 103(g) and also he said that in the future that if we have this situation, a similar situation with the 103(g) that he would idle the mines until someone higher than him told him to put the mines back to work.
>
> A. Well, when you saw fit to file your 103(g) Complaint a month later, did he idle the mines?
>
> A. No, sir.
>
> Q. Why not?
>
> A. I don't know.
>
> Q. Well, at the time you filed that complaint did you expect him to idle the mines?
>
> A. I didn't know.
>
> Q. What was that subsequent complaint over, dust again?
>
> A. Yes, sir.
>
> Q. On this very same drilling device?

A. Yes, sir.

Q. And did someone actually come out from the --

A. (Interposing) Yes, sir, the Federal Inspector came and run a dust sample.

Q. On you?

A. Yes, sir.

Q. Hung a sampler on you?

A. Yes, sir, me and the driller.

Q. And the driller and found that they were in compliance?

A. Right.

Q. And they told you that that was the end of that.

A. Right.

Q. Did you, at that time, explain to him the problem you were having with the dust and everything?

A. Correct.

Q. Was that inspector aware of previous, of this particular complaint being filed?

A. Yes, sir, I believe he was.

Q. If you heard Mr. Strickland say that he was a little concerned about the 103(g)s, you weren't intimidated in any way, were you, a month later when you filed yours?

A. (No response)

Q. Did you feel intimidated or did you feel threatened by him that he would idle the mines if you did it again?

A. Yes, sir, at the time he said that, but I went ahead because I felt like I wanted to know whether they were in compliance or not and if I could still see the difference and I didn't know if he would idle the mine.

Q. But, that didn't prevent you from doing it?

A. No, sir.

Q. Did you say anything to Mr. Strickland before you filed that 103(g) a month later?

A. No, sir, I don't believe so.

Mr. Smith testified that he had no reason to disbelieve Mr. Strickland's assertion that he could not fire the shot on Friday, because he could see that it was not loaded and ready to shoot that day (Tr. 133). However, Mr. Smith saw no reason to idle everybody, and were it his decision to make, he would not have idled the miners working on reclamation or those working in the shop (Tr. 134). He confirmed that the reason the shot was not loaded and ready to fire on Friday was because he refused to do it (Tr. 138).

Respondent's testimony and evidence

Arthur W. Burks, respondent's resident engineer and safety director, testified that he is familiar with the complaint filed in this case. He confirmed that after being informed that Mr. Smith was having problems with dust on Wednesday, April 21, 1982, during the loading of a shot, he instructed the pit foreman to have him wear a respirator, and a call was placed to MSHA's office in Bessemer by mine management for the purpose of requesting an MSHA inspection of the asserted dust problem. MSHA informed the company that a section 130(g) inspection had to be requested by a miner or his representative and not the company (Tr. 146-150). No inspector came to the mine, and Mr. Smith requested, and was given, a union "benefit day" off and left the mine (Tr. 150). Mr. Dennis Myers was then called to the mine and assigned the shooter's duty the next day, Thursday. While on the phone with MSHA and mine management concerning a second request by management for a section 103(g) inspection, Mr. Myers stated that he was having no dust problems that day and he refused to request an inspection (Tr. 153).

Mr. Burks identified a mine map, exhibit R-1, and testified as to where he believed the dragline was operating during the week in question. He indicated that by Monday, April 26, the dragline would have been within 100 to 200 feet of the partially loaded shot (Tr. 156-159). He confirmed that the shot could not be put off because the holes could not be loaded, and he believed this posed a dangerous situation because the dragline was moving closer to the shot by Monday (Tr. 160-161). In light of this situation, and in view of the fact that he did not believe he could get an MSHA inspector to the mine over the weekend, he apprised Mr. Strickland that by Monday, the dragline would "be on top of that partially loaded shot", and Mr. Burks believed that this posed an unsafe condition (Tr. 161).

On cross-examination, Mr. Burks confirmed that the position of the dragline was surveyed and plotted on a daily basis on the mine map, and that this is done for the purpose of determining the coal inventory in the pit area in front of the dragline, and he located the position of the dragline on the map (Tr. 164-169). He estimated that on Friday, April 23, the dragline was some 500 feet from the shot location (Tr. 169). He confirmed that at an advance rate of 100 feet a day, he and Mr. Strickland and Mr. Earnest believed that by Monday, the dragline would have been dangerously or periously close to where the loaded shot was located.

Mr. Burks stated that he did not know why Mr. Strickland idled the welders in the shops or the reclamation workers, and when asked whether the operation of the dragline affected their work he responded "nothing I don't guess" (Tr. 175). He confirmed that the personnel directly involved in operating the dragline in firing off the shot would be the dragline crew, the shooter, the benching dozers, and drills. The welders and mechanics would be involved in the event of equipment break-downs. He confirmed that the dragline has been down in the past, but that mine policy does not necessarily dictate that everyone goes home. He did not know whether the same dragline had been idled in the past (Tr. 176-177).

Mr. Burks testified that the Reed Drill was a new piece of equipment, and that salesmen and factory mechanics were present at the mine to demonstrate the drill to the miners (Tr. 179). He also alluded to the dust problems and generally described the operation of the drill (Tr. 180-185).

William Lynn Strickland, confirmed that he is the mine general manager, and that he was advised by a telephone call on Wednesday, April 21, from mine superintendent Earnest, that there was a problem concerning the loading of certain holes which had been drilled by the Reed SK-60 Rotary Drill, and that the shooter Ronald Smith had requested other work becomes of certain dust problems (Tr. 187). Mr. Strickland confirmed that the dust control system on the drill in question met MSHA's standards and had been approved by MSHA (Tr. 188). He also confirmed that during the period April 21 through 23, 1982, the Reed Drill and a Joy Drill were both being operated in the pit, and that drill comparison tests were being conducted so that the company could decide whether to purchase the Reed Drill (Tr. 189).

Mr. Strickland confirmed that the mine conditions were dusty during the week in question, and in view of the reluctance of the shooters to operate the Reed Drill, mine management made attempts to contact MSHA for an inspection of the drill, and no interruption in the work flow was anticipated prior to Friday, and the company had no objection whatsoever to an MSHA inspection (Tr, 192). When he learned that MSHA could not send an inspector to the mine in response to a union request made on Friday, he met with Mr. Burks and Mr. Earnest at noon on Friday to discuss the fact that a shot had been partially loaded on Friday, but that it could not be fired (Tr. 194). He discussed the situation which he faced as follows (Tr. 194-195):

> A. Yes, sir. We discussed the situation that was in front of us; we had no reason to believe that we were going to be able to get an inspector available to us; we had every reason to believe that we had a problem with the shot there that was partially loaded that we were not going to be able to shoot; we had scheduled for the machine to run

*/ The name "Strickland" is spelled "Stricklin" by respondent's counsel in his post hearing brief.

along with some of the other pieces of equipment, drillers, welders, I don't remember just exactly who had been posted to work; we knew that we would continue working that night and work on Saturday, we would have the shift come in on Sunday night, we would have another 8-hour shift there; we had no assurance that there would be an inspector on the property on Monday morning, we only knew that it had been requested, we had no guarantee that there would be an inspector there on Monday morning.

* * * Well, Mr. Burks, who was in charge of preparing the map, Mr. Earnest, who knew from looking at the map where the dragline was sitting, where the shot was, we addressed the fact of that if we continued to proceed with the dragline that there was a possibility that we would be endangering the machine. We realized, we felt like there was no safety danger as far as personnel was involved because we would move them out of the area of the shot, as that's our practice and custom, but we felt like we would be endangering the machine itself.

And, at Tr. pgs. 196-201:

Q. Did you hear Mr. Burks estimates of distances as far as where the shot area was located and where the dragline was located?

A. Some 4-500 feet.

Q. Do you agree with that?

A. Yes, sir.

Q. Is it an accurate reflection of the movement of the dragline as well as the other items which are noted on it?

A. Yes, sir.

Q. It's kept in the normal course of business?

A. Everyday.

Q. Do you depend on that map or maps like it?

A. Yes, sir.

Q. Did you depend on that map in making your decision in this instance?

A. Yes, sir, it was utilized in the decision.

Q. As I understand you listened to Mr. Earnest, you listened to Mr. Burks and you had personal knowledge of what had occurred, what was your conclusion?

A. My conclusion was that each segment of the operation in the mining of King Coal Company is dependent upon the other segment, before the dragline could come through the area has to be drilled and shot; for a coal loader to perform his function the overburden has to be removed; so each segment is dependent upon each other, so if one function was not going to be able to operate, then it would subsequently, at some later time, cause a delay or a failure of the other functions to be able to operate. On that basis I determined to idle the entire mine.

Q. Was that decision, in any way, based on any animosity that you held toward any miner or any action with respect to a safety complaint?

A. No, sir. It was an economic decision. It costs us approximately $40,000.00 a day to operate that mine.

Q. Where is most of that money spent?

A. A certain portion in labor and that balance of it in materials.

Q. If the dragline were unable to operate as you have testified you assumed it would be, could you still operate the mining?

A. Yes, sir, we could have, certain segments of it.

Q. Why did decide not to do so?

A. In my determination at that time, that would have only created a situation at a later date that those segments would have been affected by the lack of being able to shoot on that day and they would have been idled at a future date.

Q. So, in your mind at least in that point in time, it was inevitable that at some point in time all the functions of the operation would be affected?

A. Yes, sir.

Q. What did you do?

A. Sometime around 1:00 I instructed at the pits to idle the mines.

Q. Was that done?

A. Yes, sir.

Q. Did anyone work on Saturday?

A. No, sir.

Q. Did anyone work on Sunday?

A. No, sir.

Q. Did anyone report to work on the third shift on Sunday?

A. Yes, sir. We discussed that Friday, that knowing that there had been a request made for an inspector, not knowing whether they were going to come or not and knowing that the problem at the mine, if there in fact was one, centered around the drilling and shooting functions, that it was our intention at that time to bring those people in and have them working so that in the event an inspector was there, a determination could be made if a problem existed.

Q. Did you expect an inspector?

A. Well, we knew they been requested, we could only hope that one would show up.

Q. Who in fact worked?

A. I don't remember just exactly who was sitting in the particular functions at that time; the driller would have been in, the utility man on third shift, I'm not sure if a dozer operator would have been or not, but Mr. Smith, the shooter, was assigned to work along with the dayshift driller.

Q. How about Monday morning?

A. The day shift persons associated with the drilling and shooting process of which Mr. Smith was one.

With regard to the meeting of Tuesday, April 27, with the mine safety committee, Mr. Strickland confirmed that he requested the meeting, and he testified as follows as the discussion which took place (Tr. 203-204):

A. I requested Mr. Naramore, Mr. Henderson and Mr. Smith because those were the available people; Mr. Henderson as Local President; Mr. Smith because he was the most associated person with the problem; and Mr. Naramore as his Safety Committeeman, some of the other Safety Committeemen had gone and already left the parking lot. I told them at that time that I was disappointed with their actions as a Safety Committee, that I felt like that there had been reason for them to have made the request, we clearly understood that we could not make the request, and I told them that I was disappointed with their actions as the Safety Committee. Their response to that was that if they chose to call somebody out, an inspector, say on the day when Mr. Meyers was working, and that if he told them at that day or any other time that he didn't have a problem that they would look kind of foolish to have called somebody out, so they didn't. In their opinion it was not their responsibility to file on behalf of another employee.

I told them at that time the reason that we had idled the mine, that I had idled the mine because it was my decision, I think I told them something to the effect that whatever it was a good decision or a bad decision and that it was because we had the partially loaded shot and we chose not to continue allowing the dragline to move toward it.

Q. Did they respond to that?

A. Well, just other than the fact that someone questioned or either I offered, I don't exactly remember the extent of this part of the conversation, but it was discussed if it came up again in the future and I advised them at that time, under the same given conditions and circumstances that I felt like that the same decision would need to be made to idle the mine until such time that we could give a resolution.

Q. Did you ever, at any time, tell any of those individuals during this meeting or at any other point in time that any time they filed a 103(g) that you would idle the mine?

A. No, sir, a 103 had not even been filed at this time, it had been requested for, but it had never been filed.

Q. To your knowledge was it ever filed?

A. No, sir.

Q. Do you know why it was never filed?

A. No, sir.

Mr. Strickland identified exhibits R-2 and R-3 as copies of MSHA's findings concerning subsequent 103(g) inspections requested by the shooter and driller for the Reed SK-60 Drill, and those findings reflect that no violations occurred (Tr. 207). He denied that any retaliatory action was taken against the individuals who made those inspection requests (TR. 207-208). He expressed the following opinion as to why the miners objected to the use of the Reed SK-60 Drill (Tr. 210-211):

> A. Mr. Brown, I have my opinion as to why the classified employees took the position that they did in relation to the Reed SK-60 Metroplex dust control system. I assume that's where your question is leading, the result of King Coal Company utilizing that metroplex dust control system, one of the areas of responsibility for a utility person, classified employee, a member of the bargaining unit at King Coal Company was to furnish water to the drill, that drill, being prior to April of 1982 the Joy rotary drill. The end result of that was that when the Company purchased the drill and made a reduction in work force, the result was that its classified employees were reduced at the Ryan Creek Mine. This had to have had an impact on the bargaining unit at King Coal Company.
>
> They had a loss in reduction of numbers, but this had no affect on the Company's decision to purchase the Reed SK-60. It was done for a means of controlling the dust which was approved and therein we made the decision to buy the Reed SK-60 drill.
>
> Q. So at the time you purchased the SK-60 with the metroplex system, you were aware or had investigated this system and MSHA's attitude toward it, is that true?
>
> A. We only knew from the suppliers of the drill that the metroplex was an approved system.
>
> Q. Do you have any reason to doubt, at this point, particularly in light of the two subsequent 103 charges and investigations by MSHA that there is any problem with the Metroplex system?
>
> A. No, sir.

On cross-examination, Mr. Strickland confirmed that on April 23, 1982, he was at his office some 18 to 20 miles from the pit location, but based on the mine map and log book, he could estimate that the dragline was some 400 to 500 feet from the location of the shot on that day (Tr. 219).

He confirmed that the work schedules posted at the mine site on Thursday called for drillers, dozers, and the dragline to work on Saturday, but he was not sure about the welders (Tr. 220). He confirmed that he was responsibile for determining who will work and who will not work, and he confirmed that welders normally work in the shop area some 3 or 3 1/2 miles from the pit area, and that the mechanics would go around the entire operation (Tr. 222). He confirmed that the subject of the dragline working on Saturday was discussed with Mr. Earnest and Mr. Burks during their meeting on Friday, and while he personally did not see the posted work schedule, Mr. Earnest was instructed to schedule the dragline for work on Saturday (Tr. 223-228). However, he conceded that he did not know what was on the work schedule which was posted on Thursday because he did not see it (Tr. 224). No Sunday work was posted, and none is required to be posted (Tr. 228). He denied that Mr. Henderson was scheduled to work on Sunday (Tr. 229).

Mr. Strickland again reiterated his reasons for idling the entire mine, and he conceded that the dragline had operated closer to the loaded shot in the past (Tr. 230). He did not know how many holes were loaded on April 23, 1982, and confirmed that it was a "partially loaded shot" (Tr. 230). He also indicated that each "shot situation" is different, and the question as to whether one would be more dangerous than another is dependent on a number of circumstances (Tr. 231-240).

Stipulations

The parties stipulated to certain facts (Tr. 33-34), and these are as follows:

> On Wednesday, April 21, 1982 King Coal was using a Joy Brand drill with a water dust control system and a Reed brand drill with a dry "metroplex" brand dust control system. The two drills were operating in the same area, drilling holes in parallel patterns for purposes of comparison.
>
> At approximately 1:30 p.m. on Wednesday, April 21, Mr. Ronald Smith, the shooter, complained about the dust which he stated was created by the dry dust control system, refused to load the Reed drilled holes and requested work in a less dusty area. Mr. Smith's request was granted, and no further shooting was performed in the area.
>
> Late during the day shift of April 21 Mr. Ronald Smith came by the mine office and stated he was going to take a benefit day the next day. (Mr. Burks was present.) Mr. Dennis Myers was called in for the next day as shooter.

On April 22 at approximately 8:00 a.m., Mr. Earnest (in Mr. Burks' presence) asked Mr. Henderson to call the MSHA office and request a 103(g) inspection because the company's earlier request could not be honored. Mr. Henderson refused to make the call as requested and stated he had no problem with dust and the employee then working as shooter would not file. Mr. Henderson again refused to make the request.

Later that day (in Mr. Burks' presence) Mr. Earnest and Mr. Danny Henderson, local union president, telephoned the MSHA office. Mr. Burks was present while Mr. Earnest and Mr. Henderson spoke with the MSHA officials on a telephone with an extension. Mr. Henderson told the MSHA officials that he did not have a problem with dust, that the safety committee did not have a problem with dust, and that Mr. Myers who was on the shooter's job that day would not file a 103(g), and that no 103(g) inspection was being requested. Mr. Earnest was again told that MSHA could not come out without a union or miner request.

On the morning of Friday, April 23, Mr. Ronald Smith returned to the job of shooter. Mr. Smith refused to load the Reed holes and requested to see the safety committee and requested a 103(g) inspection. Smith's request for work in a less dusty area was granted. The safety committee, chaired by Mr. Naramore went to the mine office and Mr. Earnest called the MSHA office. No inspector was available, but a message was left for Jim Sanders to call as soon as possible.

On Monday morning, April 26, no inspector arrived, and Mr. Strickland personally talked with Mr. Ronald Smith who stated that he had no problem that day because it had rained and there was no dust. Mr. Strickland went on the explain to Mr. Smith the basis for the original decision to shut down the operation. Mr. Smith loaded and shot the entire shot pattern. Mr. Strickland then ordered that all miners be recalled and the mine be put back in operation.

Complainant's post-hearing arguments

In his post-hearing brief, complainant's counsel argues that the idling of the mine was totally unncessary and was done in retaliation to the filing of a section 103(g) complaint. Counsel asserts that Mr. Henderson was discriminated against because of a co-employee's attempt to exercise his rights under section 103(g)(1) of the Act, and as a result of the idling of the mine, Mr. Henderson lost several days'

wages. Counsel suggests that the clear message the respondent was sending to its employees was "Exercises your right under the law, and you will pay", and counsel submits that the respondent's idling of the entire mine not only violates both the letter and spirit of the Act, but has a chilling effect on the future exercise of the statutory rights of miners for a safe environment in which to work.

In response to the respondent's arguments that the decision to idle the mine was based on safety considerations, complainant asserts that the record here clearly establishes that on the day the mine was idled the dragline was operating approximately 500 feet from the shot area, and that prior to and since that time, it has operated closer to a shot. Complainant's counsel asserts that this defense "is incredulous" and an "artificial defense set up by the Company at trial", and that no justification or rationale was offered by the respondent to explain why shop and reclamation workers miles from the pit area were idled.

Counsel concludes that Mr. Henderson has made out a prima facie case of discrimination, and that the respondent has failed to rebut this fact. Counsel takes note of the fact that while the testimony in this case failed to establish the exact distance of the dragline on the day in question, records were available to the respondent which would have given the exact location of the dragline and the pit, and that the only inference that can be drawn from the respondent's failure to produce them is that it had something to hide.

Respondent's post-hearing arguments

In his post-hearing brief, respondent's counsel maintains (1) that Mr. Henderson is not a member of the class of persons Congress intended to protect when it enacted section 105(g) of the Act, (2) that he has offered no proof that he was ever singled out for retaliatory treatment, (3) that he has failed to establish any nexus between any of his actions and a retaliatory act by the respondent, and (4) there is absolutely no evidence of any intent to retaliate or any act of retaliation by the respondent in this case.

Counsel argues that section 105(c)(1) of the Act provides protection to miners who either: (1) file or make complaints under the Act; (2) are the subject of medical evaluations and potential transfer under section 101 of the Act; (3) institute a proceeding under the Act; (4) testify or are about to testify in a proceeding under the Act; or (5) exercise a statutory right under the Act. Counsel maintains that a prima facie case under the Act is only perfected when a Complainant takes action which places him within one of the categories of persons protected by the Act, and the mine operator then retaliates by discriminating against him based on his protected status. Counsel concludes that on the facts of this case, Mr. Henderson has failed not only to show the nexus between his protected status and the purported harm suffered, but has also failed to show that he took any action which brought him within the Act's umbrella of coverage.

In response to Mr. Henderson's assertion that the idling of the mine on Friday, April 23 was an act of retaliation against him in that the respondent's actions were based on Ronald Smith's attempt to file a request for a section 103(g) inspection, respondent's counsel argues that if the respondent here had retaliated against Mr. Smith, Mr. Smith would have grounds to file a complaint. However, since Mr. Henderson did not even work on April 23, he was not even present to take any action against which the respondent could have retaliated. Further, counsel asserts that Mr. Henderson has provided no evidence of any action on his part which could conceivably be construed to bring him within the parameters of the coverage of the Act, and that he never complained or filed a complaint on his behalf or as a miner representative. Counsel points out that Mr. Henderson refused to file a complaint.

In response to Mr. Henderson's assertion that Mr. Strickland's statements made during the April 27 meeting with the safety committee somehow "chilled" his rights under the Act, respondent's counsel argues that even assuming that Mr. Henderson's "tortured interpretation" of Mr. Strickland's remarks is credited, such a statement is not cognizable under the Act since actual interference with Mr. Henderson's statutory rights is required. Further, counsel argues that Mr. Henderson offered no evidence of any chilling effect on himself or any other employee. Counsel points to the fact that Ronald Smith testified that he filed a section 103(g) complaint approximately one month after the incident in question in this case and that the respondent took no retaliatory action against him. Counsel also argues that evidence of subsequent section 103(g) complaints concerning the drilling and shooting operations was presented at the hearing (exhibits R-2 and R-3), and this evidence establishes that similar dust complaints were subsequently filed with MSHA and MSHA found no violations existed, and there was no retaliatory action or threat by the respondent because of these complaints.

Respondent argues that the evidence in this case clearly establishes that it actually made numerous requests for a section 103(g) inspection between April 21 and April 23, and on various occasions asked the substitute shooter, the head of the Union Safety Committee, and Mr. Henderson to request such an inspection. Given these efforts on its part to initiate such an inspection, respondent maintains that Mr. Henderson's contention that it threatened to take adverse action against any miner who subsequently filed a complaing "must be viewed as absolutely incredible".

With regard to the purported "safety issue" concerning the use of the Reed and Joy Drills, respondent asserts that although Mr. Smith testified that he requested and was granted reassignment based on the dust condition which was created by the use of the Reed metroplex dust control system, the totality of the evidence shows that Mr. Smith's complaint was not based on concern for his safety. In support of this conclusion, counsel points to Mr. Smith's testimony that, to his knowledge, the Reed Drill was the first one operated by the respondent without a water dust control system and that his complaint and the complaint of other employees was based on their disenchantment with the use of a waterless dust control system (Tr. 125-126).

Respondent points out that on April 23, the Reed Drill was operated with an MSHA approved dust control system, and that the Joy Drill was operated without a dust control system of any type. Thus, while the Joy Drill presented an infinitely greater potential hazard, Mr. Smith refused to load the Reed drilled holes and testified that he did not and would not have refused to load the dustier Joy drilled holes. Furthermore, respondent maintains that even after repeated requests from mine management, Mr. Henderson, the Chairman of the Safety Committee, and the April 22 substitute shooter refused to file a 103(g) inspection request, and denied both to mine management and to the local MSHA office that a dust problem existed for anyone but Ronald Smith. Under the circumstances, respondent concludes that the 103(g) inspection request was based on motivation other than the Safety Committee's concern over the dust problem. Since the purchase of the Reed drill with the metroplex dust control system resulted in the layoff of two classified employees, and the purchase decision was not subject to the grievance and arbitration provisions of the labor agreement, respondent concludes further that the safety complaint was used as a mechanism to prevent the purchase of the drill.

In response to Mr. Henderson's contention that Mr. Strickland's decision to idle the entire mine was motivated by his desire to retaliate against the miners, respondent points out that Mr. Henderson's contention in this regard is based in part on his unreliable estimates of a cable which was spread between the dragline and the shot area, and in part on comparisons between the mine operating conditions on April 23 and the mine operating conditions on subsequent occasions when circumstances were in no way comparable. As an example, respondent refers to the shot detonated the day before the hearing in this case. Respondent maintains that Mr. Henderson ignored the fact that the shot detonated at close distance to the dragline involved both powder which had lost strength because it had been subjected to rain and a relatively shallow layer of overburden. Furthermore, respondent points to the testimony of Mr. Smith, an experienced certified shooter, who confirmed that flyrock could be thrown up to 1,500 feet and that he was unable to predict the distance such rock would travel on a given occasion. Mr. Smith also confirmed that each time a shot is put off judgment must be exercised to determine which areas are endangered. (Tr. 111-112).

In response to Mr. Henderson's contention that Mr. Strickland's idling of the immediately affected area would have been a more appropriate response, and that he went too far when he idled the entire operation, respondent maintains that it is unrefuted that every operation in the mine would have been ultimately idled by the shooter's refusal to put off the shot, and that Mr. Strickland's decision simply idled all functions at one time and thus avoided both the danger which would have been created by continued operation of the dragline and the economic loss which would have resulted from partial operation of the remaining mining functions.

Respondent asserts that in reality, after less than 23 days on the job as Vice President and General Manager, Mr. Strickland was presented with a problem he had not previously encountered. Between 12:00 noon and 1:00 p.m. on April 23, all blasting was suspended because the only classified shooter refused to load and detonate holes drilled by a new piece of equipment. MSHA had not responded to an inspection request, and an MSHA inspector was not expected until the following Monday. The only dragline in the mine was 400 to 500 feet away and advancing toward the shot area. The dragline had previously been damaged by flyrock from a shot put off by the same classified shooter who refused to load and blast because of the dust. The Mine Superintendent and the Resident Engineer/Safety Director advised Mr. Strickland that continuing to operate the dragline over the weekend would place the dragline in danger when the shot was finally detonated. A partially loaded shot endangered personnel and equipment operating in the area. Because of the integrated nature of the mining operation, every function -- including those not in the immediate blasting area -- would ultimately be affected by a cessation of the blasting. Thus, Mr. Strickland exercised his judgment and directed that the entire mining operation be idled.

Finally, respondent concludes that Mr. Strickland's decision to idle the mine was based on sound business judgment, and not on any retaliatory motive. Respondent suggests that had retaliation been his motivation, Mr. Strickland would not have reassigned Mr. Smith (the only employee who complained about dust) and then scheduled him to work on the following Monday even though the mine was otherwise shut down. Respondent maintains that Mr. Strickland had no reason to retaliate against any other employee because no other employee had made a safety complaint. Mr. Strickland simply concluded that continued partial operation of the mine under the prevailing circumstances was neither safe nor economically feasible.

Findings and Conclusions

Section 103(g)(1) of the Act provides in pertinent part as follows:

> Whenever a representative of the miners or a miner in the case of a coal or other mine where there is no such representative has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists, or an imminent danger exists, such miner or representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, signed by the representative of the miners or by the miner, and a copy shall be provided the operator or his agent no later than at the time of the inspection, except that the operator or his agent shall be notified forthwith

> if the complaint indicates that an imminent danger exists. * * * * Upon receipt of such notification, a special inspection shall be made as soon as possible to determine if such violation or danger exists * * *.

There is no dispute as to the facts and circumstances which led to the filing of this complaint, and as correctly stated by the respondent in its post-hearing brief, the decision by mine management to idle the mine on Friday afternoon, April 23, 1982, is the focal point of the dispute. During the course of the hearing, complainant's counsel argued that the actions taken by mine management in this regard were overly broad and out of proportion to the risks involved in continuing the mining operation, and counsel characterized the idling of the mine as "a brash attempt to punish miners who were trying to exercise their rights under the Act" (Tr. 26). Counsel conceded, however, that the events of Wednesday and Thursday prior to the idling of the mine did not involve any discriminatory action on the part of the respondent, and he also conceded that the idling of the mine affected all miners, and that mine management did not selectively choose Mr. Henderson for any special treatment (Tr. 23-24).

This case presents a rather unusual situation in that the respondent mine operator is essentially being accused of taking retaliatory action against the entire rank-and-file miners, and specifically Mr. Henderson in this case, because of a refusal by one of the miners complaining about certain dust problems, and Mr. Henderson, as president of the local, to file a request with MSHA for a section 103(g) inspection. At the same time, Mr. Henderson complains that the respondent mine operator discriminated against him when company Vice President and General Manager Lynn Strickland discontinued mining operations at approximately 1:00 p.m. on Friday, April 23, 1982, "idled the mine", thus resulting in Mr. Henderson's losing two days' pay for the following Saturday and Monday, April 24 and 26, 1982, days on which he normally would have been scheduled to work. Mr. Henderson concludes that this action by Mr. Strickland was "a blatant act by the company to have us sacrifice our right to a safe place to work".

Mr. Henderson confirmed that in the eight years that he has worked at the mine, while there have been differences with mine management over certain problems, they were all worked out through MSHA or through the Union's Safety Inspector (Tr. 66). He also confirmed that under the Union contract, the respondent may idle the mine "when he gets very well pleased to do so", and that the present controversy does not fall under the normal Union-Management grievance procedures (Tr. 67). He confirmed that at no time during the time periods Thursday through Tuesday, April 22 through 27, 1982, did he ever personally attempt to register a section 103(g) complaint with MSHA (Tr. 71), and he confirmed that the respondent did nothing to intimidate or keep the miners affected by any dust conditions on Wednesday or Thursday from filing complaints (Tr. 83). Mr. Smith, who has worked at the mine for over seven years, and who serves as an alternate safety committeeman, testified that past safety differences with mine management have been resolved through mutual discussions, and that "sometimes we'd have to get the District to come up" (Tr. 137).

Mr. Henderson's complaints make reference to a "safety issue". His first complaint, sighed by him on May 5, 1982, at page 4, contains a statement by Mr. Henderson that "the employees were upset over being idled because of a safety issue". At page 5 of that complaint of Mr. Henderson states "we do not want our fellow workers to compromise their safety rights in order to earn a living for themselves and their families." A second complaint, signed on May 25, 1982, on his own behalf, and on behalf of other miners listed in an attachment to his complaint, states that the idling of the mine "was done over a safety issue in which we strongly feel did not necessitate this type of discriminatory action against the employees of the Ryan Creek Mine."

It seems obvious to me from the record in this case that the "safety issue" is directly related to mine management's decision to purchase a new Reed SK-60 Rotary Drill which was equipped with a "metroplex" brand dust control system. Although the drill had the capability for a water induced dust control system, mine management opted not to use the water method and believed that the "metroplex" system was more desirable for dust control purposes. In any event, the Reed Drill, as used at the mine with the "metroplex" dust control system, apparently had MSHA's stamp of approval, and there is no evidence to the contrary.

The record in this case establishes that during the period April 21, 1982, through April 23, 1982, the Reed Drill, with the "metroplex" system, was used with a Joy Drill equipped with a water dust control system, to drill certain holes in preparation for loading and firing a shot. The drilling process being conducted at this time with the Joy and Reed drills was under normal mining operations, and the drilling was being conducted at a time when mine management had under consideration the possible purchase of the Reed Drill. The two drills were operating in the same area, drilling holes in parallel patterns for comparison purposes in order to test the operational effectiveness of the two drilling devices. In short, the Reed Drill was being used for "on the job testing purposes", and its effectiveness obviously met with mine management's approval since the drill was subsequently purchased and is still in operation at the mine. Conversely, it seems obvious from this case, that the decision to purchase that drill did not meet with the approval of some miners who had to work around it, and that is at the very heart of this discrimination case.

The record in this case establishes that on two occasions when Mr. Smith was asked to load holes which had been drilled with the Reed Drill he refused and asked to be reassigned to work in a less dusty area. The first incident involving Mr. Smith occurred on Wednesday, April 21, 1982, at approximately 1:30 p.m., when he complained about the dust created by the Reed dry dust control system. Mine management granted his request for other work and no further shooting was performed in the area. Later that day, Mr. Smith informed mine management that he was taking a contract "benefit day" off the next day, Thursday, April 22, 1982, and he did not work that day.

The second incident involving Mr. Smith took place on Friday, April 23, 1982, when he returned to his shooter's job. He was instructed to load certain holes which had been drilled by the Joy and Reed drills. He refused to load the holes drilled by the Reed Drill, and requested and was granted other work. At the same time, he requested to see the mine safety committee and requested a section 103(g) inspection. The safety committee, chaired by Archie Naramore, went to the mine office and superintendent Earnest called the MSHA office. He was informed that no inspector was available, but a message was left for Inspector Sanders to call as soon as possible.

Mr. Smith's reluctance to load and shoot the holes drilled by the Reed Drill stemmed from his belief that the drilling with that drill resulted in dry dust which had accumulated around the holes which had been prepared for loading and shooting. Mr. Smith testified that when he attempted to walk around and shovel the dust into the holes after they were loaded, the dust was dispersed into the air, and coupled with the unusual wind conditions which the parties agreed prevailed on April 21 and 23, 1982, created such a dusty environment around him, and resulted in his requests to be assigned other work.

Mr. Smith confirmed that his reluctance to load and shoot holes drilled by the Reed Drill did not affect his decision to load and shoot holes drilled by the Joy Drill. He stated that the water induced dust control system on the Joy Drill rendered the dust moist and prevented it from being dispersed when he worked around the holes drilled with that drill. In short, Mr. Smith obviously was satisfied with the Joy Drill, but was not too enchanted with the Reed Drill, even though it had an approved dust control device, namely the "metroplex" system. Although the "metroplex" system was designed to separate the respirable dust from other dust particles, Mr. Smith's reluctance to work around that drill was based on the fact that he could not visually distinguish the differences in the dust which was present. In short, he obviously believed that holes drilled with the Joy Drill presented no dust problems, but that holes drilled with the Reed Drill did. I can only assume that had the Reed Drill been provided with a water suppression dust control system, Mr. Smith would not be reluctant to work around holes drilled with that drill.

Although Mr. Smith refused to load the holes drilled with the Reed Drill, he confirmed that at the time of these refusals on April 21 and 22, he had available to him a dust respirator which had been furnished him by the respondent. However, Mr. Smith indicated that he did not use the company provided respirator because he "does not like to wear one." He also confirmed that when he was called back to work on Monday, April 26, he did not complain about any dust problems while loading holes drilled with the Reed Drill because it had rained and there were no dust problems.

The record in this case reflects that on at least three occasions, Mr. Henderson, when presented with certain facts indicating that miners were experiencing some problems with certain dusty mine conditions, opted not to file a section 103(g) inspection request with MSHA, and these are discussed below.

The first opportunity for Mr. Henderson to file a section 103(g) complaint came on Thursday, April 22, 1982, when substitute shooter Dennis Myers, filling in for the regular shooter Ronald Smith, questioned Mr. Henderson about Mr. Smith's request for other work on the previous day, and asked for Mr. Henderson's advice. Mr. Henderson advised Mr. Myers that the decision to request a section 103(g) inspection was his to make, and that he should be the one to decide whether to go ahead and load the holes or file a complaint and request an inspection. Mr. Myers decided to go ahead and load and shoot the holes which had been drilled.

Respondent's safety director Burks testified that after Mr. Henderson refused to request a section 103(g) inspection, Mr. Earnest called the MSHA office and spoke with Inspector James Sanders about the situation. While he was on the phone, Mr. Myers entered the office, and after being given the phone by Mr. Earnest, Mr. Myers advised Mr. Sanders that he had no problems with dust. Under these circumstances, MSHA refused to act on Mr. Earnest's request for a section 103(g) inspection.

The second opportunity for Mr. Henderson to file a section 103(g) complaint came on Thursday, April 22, 1982, when mine superintendent Sammie Earnest asked Mr. Henderson to call the MSHA district office and request an inspection. Mr. Earnest's request was made because a previous telephone request to MSHA by mine management the day before was denied by MSHA on the ground that a section 103(g) inspection could only be made upon request by a miner or his representative and not by the mine operator or mine management. Mr. Henderson refused to call MSHA as requested by Mr. Earnest, and he did so because he personally had no problem with dust, and the substitute shooter Dennis Myers would not file a section 103(g) request on his own.

The third opportunity for Mr. Henderson to request a section 103(g) inspection came later in the day on Thursday, April 22, 1982, when Mr. Earnest and Mr. Henderson placed a conference telephone call to MSHA officials, and Mr. Burks listened in on an extension phone. During that conversation Mr. Henderson advised the MSHA officials that he did not have a problem with dust, that the mine safety committee did not have a problem with dust, that Mr. Myers would not file a section 103(g) inspection request, and that no such inspection was being requested.

Contrary to Mr. Henderson's assertion that miners are reluctant to file complaints, Mr. Ronald Smith confirmed that a month or so after the incident which precipitated the instant complaint, he did in fact

file a request with MSHA for a section 103(g) inspection, that MSHA conducted an inspection concerning his complaint of dusty conditions, but ruled against him (Tr. 106), and that the mine was not idled as a result of his request for an MSHA inspection (Tr. 130).

Exhibit R-2 is an MSHA letter dated June 21, 1982, advising the respondent of the results of a section 103(g)(1) inspection requested by the UMWA. The purpose of the inspection was to investigate a May 24, 1982 complaint filed by a representative of the miners at the Ryan Creek Mine alleging that the driller and shooters work positions were exposed to too much dust. MSHA's findings were that the dust exposures for the two positions were tested and that the test results indicated that the respondent was in compliance and that no citations for noncompliance with the required dust levels were issued.

Exhibit R-3 is an MSHA letter dated September 7, 1982, advising the respondent of the results of a section 103(g)(1) spot inspection requested by the UMWA. The purpose of the inspection was to investigate an August 18, 1982, complaint by a representative of the miners alleging a dust problem on the Reed SK-60 Drill work position and the shooters work position, MSHA's findings were that the results of its testing and sampling indicated that the respondent was in compliance with the applicable dust exposure requirements and that no citations for noncompliance were issued.

In my view, on the facts of this case it appears to me that the respondent did everything humanly possible to meet the perceived safety concerns faced by the miners as a result of the use of the drill in question. Not only did mine management accomodate the miner who complained about the dusty conditions by assigning him other work, but management also provided him with a dust mask which he refused to wear.

With the regard to the question of requesting section 103(g) inspections, I find nothing in this record to support a conclusion that mine management ever attempted to intimidate, harass, or otherwise prevent miners, or the safety committee, from filing such requests. To the contrary, in the instant case, mine management asked the safety committee to request such an inspection, and even made the mine phone and office available to the committee, all to no avail. Further, as indicated above, on two subsequent occasions when miners saw fit to file section 103(g) requests with MSHA, mine management did nothing to prevent them from doing so, and there is absolutely no evidence that management ever retaliated against anyone, or did anything such as again idling the mine, because of those complaints. As a matter of fact, the record here establishes that the inspections conducted by MSHA in response to the 103(g) complaints disclosed that the respondent was in compliance with the applicable MSHA dust standards in question. One of those complaints concerned the very same Reed SK-60 Drill which is involved in the instant case.

Based on the testimony of Mr. Strickland, which I find credible, it would appear that the mine was idled from approximately 1:00 p.m.

Friday, April 23, 1983, until the third shift on Sunday when several workers were called back. By Monday, April 26, the day shift crew associated with the drilling and shooting process was called back to work, and by 4:00 or 4:30 that afternoon, the majority of the miners came back to work after the blast was completed (Tr. 202). Mr. Henderson's assertion that Mr. Strickland did not tell him why the mine was idled during the meeting held with the safety committee is contradicted by the testimony of Ronald Smith. Mr. Smith, who was present at that same meeting, testified that Mr. Strickland explained that he idled the mine because "he couldn't put the shot off" (Tr. 97, 117). In addition, contrary to the complainant's argument at page 4 of his brief that the respondent has offered no justification or rationale to explain why it was necessary to idle the shop and the reclamation workers who were far removed from the pit area, Mr. Strickland's testimony in this case includes an explanation as to why he made the decision to idle the entire mine. Therefore, the question is whether or not that explanation is believable.

At the heart of the complainant's argument that there was unlawful discrimination in this case is the assertion that Mr. Strickland's explanation as to why he idled the mine, and in particular his statement that it was somehow dictated by safety concerns, is totally unbelievable, particularly in light of the fact that the dragline had been operated in close proximity to a shot before and after the incident in question and the mine was not idled on those occasions.

While it is true that the dragline in question had in the past operated closer to a shot area, and in fact did so on February 2, 1983, the fact is that the circumstances which prevailed when Mr. Strickland decided to idle the mine on Friday, April 23, were not the same as those which may have been present on other occasions. For example, the complainant's assertion at page 4 of its brief that the dragline "could have been operated" on February 2d, is tempered somewhat by Mr. Henderson's own testimony that the machine did not run all day because it was down for repairs, and that he had no knowledge as to whether it was in operation on February 1st because he was at a meeting in Birmingham, and was not at work (Tr. 48). In addition, as testified to by Mr. Strickland, the question as to whether one shot is more or less dangerous than another is dependent on a number of circumstances, including the size of the shot, the number of holes loaded, proximity of men and equipment, and the like. Absent any credible showing by the complainant that the circumstances which faced Mr. Strickland at the time he made the decision in this case to idle the entire operation were the same as those which prevailed in the past when the operations were not idled, I cannot conclude that his decision was unreasonable or went too far.

After careful consideration of all of the testimony and evidence adduced in this case, I cannot conclude that Mr. Strickland's decision to idle the mine was made for the purpose of intimidating or punishing the miners for their exercise of any rights protected under the Act.

After viewing Mr. Strickland on the stand, I find him to be an honest and credible witness. I accept his explanation as to why he idled the entire mine, including the fact that this decision brought production to a grinding halt at a substantial economic loss to the respondent during the period the mine was idled. Since Mr. Strickland was responsible for the entire mining operation in question, he had the authority to take the action in question, and I conclude and find that his decision in this regard was a proper and legitimate management decision, and I reject the complainant's assertion that Mr. Strickland's explanation and justification for the decision was somehow concocted to cover up his intent to punish the entire work force at the mine.

Conclusion and Order

In view of the foregoing findings and conclusions, I conclude and find that the record in this proceeding does not establish by a preponderance of any reliable, credible, or probative evidence that the respondent discriminated against the complainant because of any protected safety activities on his part. Under the circumstances, the complaint IS DISMISSED, and the relief requested IS DENIED.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

May 9, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of GERALD D. BOONE, Complainants	:	COMPLAINT OF DISCHARGE, DISCRIMINATION, OR INTERFERENCE
	:	Docket No. WEVA 80-532-D
v.	:	HOPE CD 80-67
REBEL COAL COMPANY, Respondent	:	

INTERIM DECISION AND ORDER APPROVING SETTLEMENT AND SCHEDULE OF PAYMENTS

This case was remanded to the undersigned on April 28, 1983, to resolve the disputed issue of back pay and interest due the Complainant, Gerald Boone, for periods after October 9, 1981. The initial decision finding unlawful discharge of Mr. Boone was issued July 8, 1981, and damages were awarded by order dated January 11, 1982. The Secretary of Labor subsequently intervened on behalf of the Complainant on a petition for enforcement of the final Commission order.

The U.S. Court of Appeals for the Fourth Circuit granted the Secretary's petition for enforcement and directed the Commission to resume jurisdiction in the event the precise amount of back pay could not be agreed upon by the parties. The parties could not agree and expedited hearings were thereafter held on this matter in Charleston, West Virginia, on May 5, 1983. During the course of the hearings, the parties proposed a settlement agreement which included payment of $15,000 under a schedule of payments to be made by Respondent through January 1, 1984 (Exh. A). It was further agreed that the undersigned would retain jurisdiction in the matter until final payment is made under the agreement. Accordingly, this Interim Decision and Order is not the final disposition of the proceedings. See Commission Rule 65, 29 CFR § 2700.65.

ORDER

The proposed settlement is approved and Rebel Coal Company is Ordered to pay to Mr. Gerald Boone as back pay and

interest for periods after October 9, 1981, the following amounts in accordance with the following schedule:

June 1, 1983	$1,000.00
July 1, 1983	2,000.00
August 1, 1983	1,000.00
September 1, 1983	1,000.00
October 1, 1983	2,000.00
November 1, 1983	2,000.00
December 1, 1983	2,000.00
January 1, 1984	3,117.95

It is further Ordered that the Rebel Coal Company pay the amount of $882.05 for costs and expenses to District No. 17, United Mine Workers of America, on January 1, 1984.

Gary Melick
Assistant Chief Administrative Law Judge

Distribution: By certified mail.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAY 13 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. WEVA 83-62 A/O No. 46-05793-03504
v.	:	Mine No. 14
ENERGY COAL CORPORATION, Respondent	:	

DECISION

The parties move for approval of their amended motion to approve settlement of the five violations charged. The original motion (in the amount of $148.00) was denied by the trial judge on the ground that the amounts proposed for the backup alarm violations were insufficient to insure future compliance.

The widely shared view that backup alarm violations are not significant and substantial in the absence of a showing that miners were actually endangered by the unsafe condition is erroneous. In Brown & Root v. OSHRC, 639 F.2d 1289, 1294 (5th Cir. 1981), the court held the Secretary need not prove a specific employee was actually endangered by the operator's failure to provide an operable backup alarm, "but only that it was reasonably certain that some employee was or would be exposed to that danger." Thus, if the potential for contact with a piece of mobile equipment is reasonably forseeable a serious injury is probable. Because the consequences of such a preventable condition are so grave, a penalty of $20.00 fails to reflect the proper regulatory concern. As the court noted: "The goal of the Act is to prevent the first accident, not to serve as a source of consolation for the first victim or his survivors. Hence, no proof of specific instances where employees were exposed to the hazardous condition is necessary to support a finding of violation." Id.

Accordingly, and in the exercise of his power and duty to ensure that settlements are in accord with the purposes and policy of the Act, the trial judge recommended the penalties for the two backup alarm violations be increased from $68 and $20 respectively to $200 each. The amended motion accepts this.

Based on an independent evaluation and de novo review of the circumstances, I now find the settlement proposed is in accord with the purposes and policy of the Act.

It is ORDERED, therefore, that the motion to approve settlement be, and hereby is, GRANTED. It is FURTHER ORDERED that the operator pay the settlement agreed upon, $460.00, on or before Friday, June 3, 1983, and that subject to payment the captioned matter be DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W COLFAX AVENUE, SUITE 400
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MAY 17 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. OZARK LEAD COMPANY, Respondent.	CIVIL PENALTY PROCEEDING DOCKET NO. CENT 81-269-M

Appearances:

Robert S. Bass, Esq., Office of
Tedrick A. Housh, Jr., Regional Solicitor
United States Department of Labor
Kansas City, Missouri 64106
For the Petitioner

Gerald T. Carmody, Esq.
Bryan, Cave, McPheeters & McRoberts
St. Louis, Missouri
For the Respondent

Before: Judge John J. Morris

DECISION

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, (MSHA), charges respondent, Ozark Lead Company (Ozark), with violating Title 30, Code of Federal Regulations, Section 57.3-22 1/, a regulation adopted under the Federal Mine Safety and Health Act, 30 U.S.C. 801 et seq.

1/ The cited regulation provides as follows:

57.3-22 Mandatory. Miners shall examine and test the back, face, and rib of their working places at the beginning of each shift and frequently thereafter. Supervisors shall examine the ground conditions during daily visits to insure that proper testing and ground control practices are being followed. Loose ground shall be taken down or adequately supported before any other work is done. Ground conditions along haulageways and travelways shall be examined periodically and scaled or supported as necessary.

After notice to the parties a hearing on the merits was held on August 9, 1982 in St. Louis, Missouri.

The parties filed post trial briefs.

Issues

The issues are whether respondent violated the regulation and, if so, what penalty is appropriate.

Admissions

Ozark admits it is a large operator subject to the Act (Tr. 6).

Petitioner's Evidence

William Burich, Gene Cowsert, and Steve Barton testified for the Secretary. The evidence shows the following:

William Burich, an MSHA inspector experienced in mining, inspected the Ozark lead and zinc mine on May 6, 1981 (Burich 11). Ozark was using the Roman Pillar mining method. The area inspected was a working section of the mine which was being mucked out at the time (Burich 11, 13, 18). There were no employees in the heading when the inspection party arrived. The loader operator had left about 30 to 40 minutes before they arrived, (about 10:55 a.m.) (Barton 47, Burich 32).

Since Gene Cowsert, the loader operator, was at lunch the inspector didn't see loader No. 179 under the loose. However, Cowsert had been working under the brow for four hours (Burich 19, 20).

Inspector Burich didn't know if the loose had been present when the loader operator went to lunch. But in the inspector's view, Ozark violated that portion of the regulation requiring proper testing and observation before proceeding. (Burich 21).

Burich was accompanied by Jack Cottrell and Mike Roderman, both management representatives, as well as other persons (Burich 17).

Burich pointed out loose material in the brow of the drift. Roderman and Steve Barton (miner's representative) also saw the loose (Burich 17; Barton 38-39, 45).

Loose material (sometimes simply referred to as "loose"), is material that is detached from the host rock. It can become unstable to a point where it cannot be supported by the surrounding mass 2/ (Burich 13).

The inspector photographed the loose which had a chalky appearance. Cracks usually develop and the chalky appearance occurs with the passage of time. Temperature variations cause this appearance (Burich 14, 15; P2). It is impossible to determine the exact amount of time loose takes to dry out and turn chalky in appearance (Burich 16).

The citation was immediately terminated. Scalers brought down about half a ton of raw rock. In this area it was 18 feet from the ground to the brow (Burich 18).

The loader operator, who had been mucking in the area, stated to the MSHA inspector that he didn't know the loose was there. He further stated that in any event he was working on the opposite side [of the passageway], away from the loose 3/ (Burich 24, 25, 29). The mucker operator (Gene Cowsert) had been assigned to work in this area at 7:30 a.m. and he returned from lunch at 11:45 a.m. (Burich 32).

In the inspector's opinion the loose material he observed was in the state of drying out. But he didn't know how long the oxidation process had taken. It had been there more than a couple of minutes. It forms instantaneously and then dries out (Burich 34, 35).

Gene Cowsert, the 179 Caterpillar loader operator, had been assigned to muck out the area that had been blasted in the morning of May 6th (Cowsert 52). He arrived at the muck pile about 8 a.m. and checked the area. He didn't observe any loose material (Cowsert 54).

The operator went to lunch about 10:45 a.m. and returned about 11:30 a.m. The inspection team was then present (Cowsert 56, 57). Cowsert had looked at the area at the start of a shift and two or three times thereafter (Cowsert 59). Cowsert didn't observe any loose. He had been trained by Ozark to examine for loose (Cowsert 59).

2/ A similar definition in an industry dictionary states:

Loose ground. a. Broken, fragmented, or loosely cemented bedrock material that tends to slough from sidewalls into a borehole. Also called broken ground. Compare breccia, b. Long. b. As used by miners, rock that must be barred down to make an underground workplace safe; also fragmented or weak rock in which underground openings cannot be held open unless artificially supported, as with timber sets and lagging. Compare broken ground, b. Long. Bureau of Mines, U.S. Department of Interior, A Dictionary of Mining, Mineral and Related Terms (1968).

3/ A credibility issue arises as to whether the operator knew he was operating his loader under the discolored loose. On this issue I credit Cowsert's testimony. He would know where he operated his loader on this particular day. Further, with 15 years experience, he appears to have a healthy respect for loose (Cowsert 61).

Cowsert told Roderman he hadn't seen any loose. Roderman asked Cowsert to confirm that fact in a written statement (Cowsert 57, 58).

Respondent's Evidence

Clifford Cauley, Mike Roderman, and Ronald Thomas (by deposition) testified for Ozark.

Between 8 a.m. and 9 a.m. on the date of the inspection Ronald Thomas, Ozark's general foreman, inspected the area where the loose was discovered by the MSHA inspector (Thomas deposition 8-10). When he had inspected this precise spot earlier in the day there was no loose in the area except up close to the face (Thomas 9). Foreman Thomas and the Ozark drill blast foreman used a 12 volt light attached to their hard hats to make their daily inspections (Thomas 13, 15; Cauley 77). If Thomas sees cracks in the ground he sounds the area. He didn't use a scaling bar or a sounding bar at the time of his early morning inspecton on May 6 because the ground looked good to him (Thomas 16). Thomas agrees there was loose present at the time of the inspection (Thomas 16-17, 29).

Cowsert had been assigned in this area before the day of the inspection. He would have traversed the area under the brow in operating his loader (Thomas 17, 19).

Ozark's superintendents inspect the ground daily. Any loose ground is taken down before work is done. The production foreman had instructed Cowsert, the loader operator, to examine and test the back, face and ribs (Thomas 9-11).

The area, an active heading, had been shot four or five hours before the citation was issued (Thomas 9-10, 12). The blast could have caused the loose. Thereafter oxidization by the air could have caused it to become white or the oxidation could have been caused by the heat generated by the exhaust from the front end loader (Cauley 79, 80).

Thomas has seen loose thousands of times, but he couldn't say how long it takes to develop. Heat will cause loose to form (Thomas 24).

Clifford Cauley, Ozark's drill blast foreman, was responsible for this heading (Cauley 69). He inspected this area twice before he was called to the heading where the MSHA inspector and Ozark's safety team observed the loose (Cauley 69-70). Cauley's initial inspection of the area was about 7:45 a.m. and his next inspection was about 10:30 a.m. (Cauley 71).

When he inspected Cauley particularily looked for loose, cracks, or discoloration in the rocks (Cauley 70, 71). He observed no loose on his two early inspections (Cauley 72). Due to stress points and air flow loose has a tendency to form with a greater degree of frequency here than at our place in the heading (Cauley 72, 73).

The loose was present on the third occasion which was at the time of the MSHA inspection (Cauley 71-72).

Loose, an everyday occurrence, can form instantly. Cauley had no opinion as to how long it took the loose in this heading to form (Cauley 73, 74). It can exist before the chalky white coloring causes it to be noticed (Roderman 84).

Cowsert, the loader operator, had been instructed to observe and scale down any loose material. Training classes stress this subject (Cauley 75). According to Cauley, in this particular heading, the miner examined and tested the back face and rib of the working place at the beginning of the working shift and thereafter (Cauley 75).

Mike Roderman, Ozark's safety inspector, saw the loose for which the citation was issued (Roderman 81, 82). The loose was in the process of drying out and changing color (Roderman 82). At the time of the inspection the loose didn't have its characteristic noticeable white color to it. It didn't look like it had dried out over an [extensive] period of time (Roderman 83).

Ozark enforces a policy to discipline a miner for working under loose. Ozark's discipline commences with a verbal reprimand. Then a written reprimand is followed by an additional written reprimand and suspension. Termination can result (Roderman 84, 85).

Roderman was told by Cowsert that he didn't see the loose. When Roderman asked Cowsert for a written statement to that effect the operator initially agreed to do so. Later he changed his mind (Roderman 83, 84).

Discussion

The regulation, Section 57.3-22 imposes multiple requirements. A breakdown of the regulation indicates it imposes the following broad directives:

"Miners are to examine and test the back, face, and rib of the working place at the beginning of each shift and frequently thereafter."

Further, "supervisors shall examine the ground conditions during daily visits to insure that proper testing and ground control practices are being followed."

Further, "loose ground shall be taken down or adequately supported before any other work is done."

Finally, "ground conditions along haulageways and travelways shall be examined periodically and scaled or supported as necessary."

The pivitol evidence in the case arises in the testimony of Ozark's loader operator Gene Cowsert. The evidence clearly establishes that Cowsert visually inspected and checked the working place (Cowsert 54, 59, 60, 61, 63-64). But there is no evidence that Cowsert met the additional requirement of the regulation that he "test" the back, face, and rib.

The regulations themselves do not define "examine" or "test" § 57.2. But the ordinary meaning of these words would indicate that to examine is to "inspect closely", whereas "test" is "a critical examination, observation or evaluation" Webster's New Collegiate Dictionary, 1979.

In describing his activities involved in his initial inspection to determine the presence of loose the loader operator stated:

> I got off the loader, walked around the muck pile, underneath the brow, and checked in front and behind the brow. (Transcript at 66).

Further, in the examination of Cowsert, the following question was directed to him:

> With respect to this particular heading on that morning, Mr. Cowsert, this regulation states, which is 57.3-22 that miners shall examine and test the back face and rim of their working places at the beginning of each shift and frequently thereafter."
>
> Did you do that?
> A. I visually inspected the back. I could not reach the back. (Transcript at 59-60).

Since the terms "examine" and "test" are used in conjunction they both have a meaning. I consider that "examine" in the regulation means to "look at" and "test" in this factual setting means to sound out the area with a scaling bar or other such device.

Ozark argues that no evidence establishes that work was performed while loose was present.

I agree with Ozark's view of the evidence. No credible evidence establishes that work was performed in the presence of loose. But Ozark should only prevail if the "loose ground shall be taken down" after it is discovered eliminates the necessity of the miner "to examine and test." As previously indicated I believe the regulation imposes multiple and separate obligations.

Further, on this record, it is quite possible that testing the working place might not have revealed any loose. But Cowsert's testimony establishes the reason for the testing requirement. You can look at loose and not see it (Cowsert 67). In fact, while the scalers were barring down the loose after the violative condition was observed, an amount of loose that was not discolored, and could not be seen, also fell from the left side of the 32 foot brow (Barton 41-46, 49).

It accordingly follows that Cowsert, the loader operator, did not comply with those conditions imposed on the "miner" as set forth in the first portion of the regulation. Having failed to do so, a violation is established.

In arriving at the conclusion that a violation occurred, I necessarily reject that portion of the testimony of respondent's witness Cauley that "the miner (Cowsert) examined and tested the back, face and rib of this working place at the beginning of the working shift and frequently thereafter" (Tr. 75).

I reject the foregoing evidence because Cauley's testimony on this point is somewhat hedged. Further, since he wasn't present at all times he wouldn't have any way of knowing what Cowsert did by way of examining and testing the back, face and rib.

A violation also exists notwithstanding the testimony of mine superintendent Thomas and drill blast foreman Cauley to the effect that they checked for loose on the day the citation was issued. Thomas between 8 a.m. and 9 a.m. (Thomas 8); and Cauley at 7:45 a.m. and 10:30 a.m. (Cauley 71). The obligation of the supervisors arises under the second portion of the regulation.

Ozark contends that the Secretary is attempting to establish strict liability for the existence of loose anywhere in a mine. Ozark focuses this argument because the Secretary claims that a violation exists regardless of whether a miner was in the area. Ozark argues such a position would work an injustice on a prudent, safety conscientious operator.

As hereafter noted, I do not acquiesce in the Secretary's position but I disagree with Ozark's argument. To the contrary I conclude the Secretary in this portion of Section 57.3-22 is merely attempting to require a miner to test for loose, in addition to visually inspecting for it.

Ozark, in its post trial brief, cites several authorities in support of its views. These cases follow:

Ozark Lead Company, CENT 81-102-M, January, 1982 (unpublished): This unreviewed decision is not controlling. The citation before Judge Gary Melick charged "a violation of that part of the mandatory safety standard that provides that loose ground shall be taken down or adequately supported before any other work is done."

In this case the citation states as follows:

> There was loose material on the east side of the brow that lead to the 208-583 North Heading. Loader No. 179 had been operating under the loose material. There was sufficient loose involved that could cause serious injuries to persons under it in the event it fell.

In short, Judge Melick's decision is not controlling because the issues raised in the case did not give rise to a violation of the "examine and text" portion of § 57.3-22.

Ozark Lead Company, 4 FMSHRC 539 (1982): There is such a paucity of facts in this unreviewed decision that I am unable to determine the relevent rule of law that may be involved.

Pennsylvania Sand Glass Corporation, 1 FMSHRC 1191 (1978): Ozark asserts this case stands for the proposition that the MSHA inspector must personally observe a violation to issue his citation. In this factual situation Ozark apparently would require the inspector to observe a non-event. That is, while observing the miner at work he must further observe that he failed to "test" the working place.

The same point, that is, the "personal observation" issue was raised in Arch Mineral Corporation, 3 FMSHRC 468 (1983). In Arch Mineral respondent also relied on Pennsylvania Glass. The decision in Arch Mineral, applicable here, basically holds that Pennsylvania Glass is not controlling.

In the instant case the MSHA inspector observed chalky white loose. Some (undetermined) time elapsed between when the loose formed and when it was seen by the inspector. These factors combined with the information that this was an active heading. These facts constitute sufficient probative circumstantial evidence to justify the inspector's belief that a violation existed. Section 104(a), now 30 U.S.C. 814(a).

Homestake Mining Company, 2 FMSHRC 2295 (1980) is the only Commission decision that construes 30 C.F.R. § 57.3-22. Concerning this decision Ozark declares that the Commission's statement in its decision concerning exposure to hazard is dictum and therefore not persuasive (2 FMSHRC at 152). I agree that the Commission's statement is dictum but I do not agree that it is of no precedential value. In Homestake the Commission was considering the third requirement of § 57.3-22, namely, that miners examine a working place for loose ground before commencing work. In this circumstance the Commission ruled that "the presence of loose rock in the working place establishes the violation regardless of whether the miners were actually exposed to the danger exposed by the rock" (2 FMSHRC 157, footnote 7).

The instant case, as previously discussed, involves a failure of the miner to test. I arrive at the same conclusion reached by the Commission: No exposure to the hazard is required. In fact, there need not be a hazard and there would be none if there is no loose. Simply restated, the regulation requires the workplace to be tested.

Asarco, Incorporated, 2 FMSHRC 920 (1980): This case, authored by the writer, proports to establish an exception to the enforcement of § 57.3-22. The exception: Miners are not required to expose themselves to an additional hazard of standing on a muck pile to bar down loose and unconsolidated ground, 2 FMSHRC at 924. ASARCO is an unreviewed decision. Assuming ASARCO establishes a permissible defense, Ozark failed to prove the defense. The drawing illustrating the testimony here indicates the loose ground was not in close proximity to the muck pile (Cowsert 53; Exhibit P3).

I note that various unreviewed Judges' decisions have construed § 57.3-22. The decisions include Magma Copper Company, 3 FMSHRC 345, 352 (1981); (Carlson, J). Held: No loose existed within the meaning of the regulation because it took fifteen minutes to bring down part of the wall. See also Climax Molybdenum, 2 FMSHRC 3158 (1980); Day Mines, Inc., 2 FMSHRC 1720 (1980); and St. Joe Zinc Company, 1 FMSHRC 1699 (1979).

Finally, Ozark states that the interpretation urged by the Secretary overlooks the clear language of § 57.3-22, namely:

> Loose ground shall be taken down or adequately supported before any other work is done.
> (Emphasis added)

Ozark insists that the work only proceeded after the loose was scaled down. Therefore, Ozark states it complied with the regulation.

Yes, Ozark complied with one of the requirement of § 57.3-22. But Ozark failed to comply with the "test" portion of the regulation.

Two additional matters concern the Secretary's arguments in his post trial brief. He petitions the Commission, based on Homestake to declare that "a violation is established by proving that loose was present in a working area" (Brief at 3).

Such a broad and sweeping interpretation of this multifaceted regulation is not warranted. The Commission recognizes that loose ground is a fact of everyday mining, especially after blasting.

The Secretary's brief further states that the pertinent portion of § 57.3-22 in this contest is the portion that reads:

> Loose ground shall be taken down or adequately supported before any other work is done.

For the reasons previously indicated I do not find that the above cited portion to be pertinent in this factual setting.

In sum, the citation should be affirmed.

CIVIL PENALTIES

Section 110(i) of the Act [30 U.S.C. 820(i)] provides for the criteria to be considered in assessing a civil penalty.

Neither party urges any position concerning a civil penalty. After reviewing the record and in view of the statutory criteria I deem that the penalty proposed by the Secretary is appropriate.

The Solicitor and Ozark's counsel filed detailed briefs. These have been most helpful in analyzing the record and defining the issues. I have considered these excellent briefs. But to the extent they are inconsistent with this decision, they are rejected.

Based on the foregoing findings of fact and conclusions of law I enter the following:

ORDER

Citation 543889 and the proposed civil penalty therefor are affirmed.

John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAY 17 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. LAKE 80-83-M A/O No. 11-01176-05005
v.	:	Barry Plant No. 8 Dredge and Mill
MISSOURI GRAVEL COMPANY, Respondent	:	

DECISION

Statement of The Case

Upon remand of this matter, the five guarding violations charged came on for hearing in St. Louis, Missouri on November 4-5, 1982. 1/ After an evidentiary hearing, tentative bench decisions issued dismissing three of the citations. Whereupon, the Secretary stipulated that unless his position with respect to the applicable standard of liability is upheld on appeal all of the violations will be dismissed. 2/

1/ In my summary decision of July 8, 1980, I rejected the Secretary's claim that "any conceivable exposure" to moving machinery parts is per se a violation of the uniform moving machinery parts standard found at 30 C.F.R. 55/56/57.14-1 and 75.1722(a) and 77.400(a). I found that due to the presence of existing guards or physical location each of the nip or pinch points cited was so inaccessible that it was highly improbable that in the course of performing his routine or assigned duties any normally prudent miner was likely to come in contact with moving machinery parts. The Commission reserved decision on whether I "properly interpreted and applied the standard" but reversed on the ground there was a genuine dispute of material fact with respect to the "potential for contact and injury." 3 FMSHRC 2470, 2471, 2473, n. 3 (1981).

2/ See the parties' stipulation of April 7, 1983 and posthearing briefs in support of and opposition to the tentative decisions.

The dispositive issue is whether, as the Secretary contends, the "use of machinery" standard imposes strict or absolute liability on an operator to provide expanded metal guards around pulleys where exposure to contact with nip or pinch points is, in any way, conceivable or possible, 3/ or whether, as the operator contends, such guards are not required unless it is reasonably predictable or forseeable that miners performing their routine or assigned duties in a normally prudent manner may accidentally, inadvertently or negligently be exposed to contact and injury. Operator's Br., p. 7.

Prior to trial the Secretary vacated the finding that the violations were "significant and substantial" because, it was conceded, none of the conditions cited created a "reasonable likelihood that the hazard contributed to [i.e., a contact] would result in an injury . . . of a reasonably serious nature" (Tr. 105-108). Compare, Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (1981) The Secretary also conceded the violations involved "only a minor degree of gravity." This was congruent with the inspector's finding, made at the time he

3/ Trial counsel's articulation of the standard for liability was "any reasonable chance" for contact and injury. Secretary's Br. p. 5. In his earlier appeal, the Secretary's appellate counsel embraced a "reasonably forseeable" standard and eschewed an interpretation that would include liability for totally irresponsible or aberrational behavior that resulted in exposure to contact and injury (Tr. 143, 210-212).

issued each of the 104(a) citations, that the likelihood of contact and injury was "improbable," (GX 3, 5, 6) i.e., unlikely that even without the expanded metal guards contact would occur or that if it did it would necessarily result in an injury (Tr. 185-186). Over the objections of his counsel, the inspector said he evaluated the likelihood of contact as "improbable" because other inspectors had approved the guards previously installed by the operator and because he believed that while there was a "chance" that in the long run some one might be hurt there was just as good a "chance" that no one would get "caught" in the cited pinch points (Tr. 81-86).

Having trivialized the charges, the Secretary proceeded to trial on the theory that the standard in question imposes strict liability for an operator's failure to guard pinch points so as to eliminate every "reasonable chance" or "possibility" of contact and injury, including the chance that such contact and injury may result from thoughtless, foolhardy, or even deliberate acts of misconduct or misbehavior unrelated to a miner's routine or assigned duties. I dismissed the charges on the ground that it was not reasonably forseeable that a miner performing his routine or assigned duties in a normally prudent fashion would be likely to accidentally, inadvertently, thoughtlessly or negligently contact the pinch points in question.

Citation 367379

On August 7, 1979, a federal mine inspector issued this citation for a violation of 30 C.F.R. 56.14-1. 4/ The charge was that the drive pulley on the main incline belt conveyor at the Barry No. 8 Plant, Pike County, Illinois, was not guarded. It was further charged that a start/stop switch or button was located approximately one and one-half feet (18 inches) from the pinch point of the pulley (GX-3).

The evidence showed the pinch point in question was located atop a 50 foot high piece of equipment the main access to which was up a steep 200 foot ramp. None of the seven miners employed at the sand and gravel operation was regularly assigned to work or travel in the area near the pinch point. The undisputed photographic evidence and testimony established that in order to abate a prior citation a guard in the form of a 2-inch angle iron railing or barrier 40-inches (waist) high and three and one-half feet (42 inches) from the

4/ This and the other use of equipment standards read as follows:

> Gears, sprockets; chains; drive, head, tail, and take-up pulleys; flywheels; couplings, shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded.

pinch point had been installed. 5/ In addition, the emergency stop-start switch was 26 inches from the protective railing (18 inches from the pinch point) and could easily be reached without going inside the barrier. The emergency switch could be activated without placing a miner's torso closer than 42 inches and his hand closer than 18 inches to the pinch point. The inspector testified it would be "almost impossible" for a miner to contact the pinch point while standing outside the barrier (Tr. 121). The inspector thought the only way a miner might become entangled in the pinch point without going inside the protective railing was if he would "topple" or fall over the 40-inch waist-high barrier. I find this suggestion too unlikely, remote and speculative to rise to the level of a reasonably forseeable probability, although it was, of course, a possibility. The inspector's imaginative suggestion was also at odds with the Secretary's and his concession that a contact was "improbable" or that if a contact did occur it would not in all probability result in an injury of a reasonable serious nature.

5/ Assessment Office conference notes of October 1979 submitted as part of the Secretary's prehearing submission stated that the penalty was reduced from $78 to $36 because "Inspectors Rostler and Osborne had previously accepted this (2" angle iron barrier) as this had been used to abate Mr. Rostler's citation" for a chain and sign guard. The record does not show the date of Inspector Rostler's citation. An identical chain and sign guard was cited by Inspector Ogden on May 24, 1979, only two months before the inspection under review. On contest the violation charged was sustained by Judge Fauver on the ground that the guard was inadequate to prevent contact by miners who might slip and fall while performing their regularly assigned duties. Missouri Gravel Company, 3 FMSHRC 1465 (1981).

The citation was terminated after the operator installed an expanded metal screen around the front of the pulley nearest the stop-start switch (RX-1, 3). As the photographs graphically show the "guard" approved for abatement did not purport to enclose the pulley motor, gear box or sprocket. Thus, the partial screening provided would not prevent a miner from working near exposed moving machinery parts while the pulley was in motion (RX-1, 3; Tr. 203-204).

If, as the inspector believed, miners will take a chance and perform maintenance or other work on a pulley and its motor while it is in motion, the partial guard which the inspector required would only create a greater hazard as it severly constricted the area in which such work must be performed. For these reasons, I find the method of abatement required failed to provide the failsafe, foolproof protection for which the Secretary contends and, if anything, created a more serious hazard than existed before the protective railing barrier was outlawed.

Returning to the question of the adequacy of the protective railing, the principle conflict in the testimony related to how often miners were required to go inside the protective railing to lubricate or do maintenance work on the drive pulley. The inspector, who had no personal knowledge, guessed a miner might have to go inside the barrier once or twice a day. On

the other hand, the plant superintendent, who had nine years experience as a supervisor at this plant persuasively pointed out that to his personal knowledge the pulley required lubrication and maintenance only once or twice a year 6/ but that in accordance with the company's safety policy which paralleled the mandatory safety standards, the conveyor belt and pulley were required to be deenergized and locked out while maintenance work was being performed. 7/ I find there is no probative evidence to support a conclusion that the operator was evading or ignoring approved lockout procedures when maintenance was performed on this equipment.

The inspector also testified that unidentified informants told him that they would on occasion go inside the protective railing to lubricate or do other maintenance work on the conveyor belt and the pulley while the machinery was in motion. 8/ The inspector said these miners told him they sometimes did this on

6/ The plant operated only seven or eight months a year from April to November.

7/ See 30 C.F.R. 56.12-16, 56.14-29, 56.14-34, 56.14-35. An exception to this is found in 30 C.F.R. 56.14-6 which permits machinery to be operated without guards during testing. In Union Rock and Materials Corp., 1 MSHC 2377 (1980), the trial judge held this exception applies to testing or repair of mechanical parts due to a malfunction. Nothing in Inspector Aubuchon's testimony in this case indicated a recognition of this exception.

8/ Counsel refused to allow the witness to disclose the names of informants on the ground it was against departmental policy to do so.

their own initiative but that at other times they were told to ignore company policy and the safety standards by their "boss" (Tr. 114-117, 126,-138). The inspector admitted he had never seen a miner working on the equipment while it was in motion and there is no evidence that a "hot line" or 103(g)(1) complaint was ever received by MSHA about such a practice. Nevertheless, the inspector thought that because it was human nature to take chances, or because of the pressure for production, a miner might (1) on his own, (2) because he thought it was expected of him, or (3) because he was directed, go inside the protective railing or barrier to work on the pulley or other equipment while the machinery was in motion.

I can, of course, give no weight or credence to an inspector's uncorroborated hearsay recitals of what unidentified informer-accomplices allegedly said or did or their motivation for doing so. 9/ These recitals are relied upon by the Secretary as proof that the protective railing did not

9/ There is nothing in the inspector's contemporaneous notes or other written statements to support his hearsay recitals. With respect to credibility, the record is replete with the inspector's flashes of hostility and resentment toward both his fellow inspectors and the operator over their differences with respect to the adequacy of the protective railing guard.

preclude work on the machinery while it was in motion. 10/ The Secretary argues that because miners are inclined, regardless of the personal risk, to work on machinery while it is in motion in the absence of failsafe, foolproof guards, "the operator must install a guard that will physically prevent the employee from contacting the machinery while it is in operation." Secretary's Br. p. 11. Because of the highly prejudicial and incriminating nature of the informers' assertions, fundamental fairness required the Secretary identify and permit cross-examination of the miners who allegedly furnished this information.

The informer's privilege is no excuse for the Secretary's refusal to identify these individuals. In Roviaro v. United States, the Supreme Court recognized that a limitation on the assertion of the informer's privilege arises from the dictates of fundamental fairness. 352 U.S. 53, 60 (1957). There the Court held that where disclosure of the identity of an informer is relevant and helpful to the defense of an accused, or is essential to a fair determination of a criminal case, the privilege must yield to the requirements of due process and and the right of cross-examination. The same exception applies

10/ As we have seen, even the guard installed to achieve abatement did not preclude work on the machinery while it was in motion. In fact, no guard will preclude access to machinery while it is in motion, since all guards are removable. The partial expanded metal guard installed to abate was merely bolted and wired to a frame mounted on the front of the pulley and was easily removed.

to civil and administrative proceedings. United States v. Hemphill, 369 F.2d 539, 542 (4th Cir. 1966); Massman-Johnson (Luling), 7 OSHC 1369, 1371 (1980).

The exception is particularly applicable where, as here, the informers were themselves reputedly wrongdoers or were allegedly coerced to participate in or set up and carry out activity that, at least in the inspector's mind, rendered the protective railing, or indeed any removable guard, inadequate. Compare, U.S. v. Ayala, 643 F.2d 244, 246 (5th Cir. 1981); U.S. v. Varella, 692 F.2d 1352, 1355 (5th Cir. 1982); Supreme Court Standard 510(c)(2) (Reprinted in 2 Weinstein's Evidence, 510-1, 1982).

For these reasons, I found "extraordinary circumstances" for identification existed (Rule 59), and upon the Secretary's continued refusal ordered the hearsay recitals stricken. I see no reason to change that ruling now.

I am willing to concede that it is reasonably predictable and forseeable that miners will engage in isolated acts of conscious, knowing or willful self-endangerment. What I cannot find on this record is that the standard in question imposes upon an operator a duty to prevent such aberrational, abnormal or potentially self-destructive conduct by an employee. In fact, I cannot find and have not been advised of anything in the statute or the administrative history of the standard

that warrants the imposition of a duty to provide an absolutely risk free workplace. 11/

It is one thing to provide strict liability, i.e., liability without fault for reasonably forseeable and preventable acts of ordinary negligence or thoughtlessness by miners performing assigned duties in accordance with the mandatory safety standards, common sense, and safe mining practices. It is quite another to impose such liability for conscious acts of endangerment. Even miners with room temperature intelligence and a modicum of natural caution should have been given pause by the protective railing, the ready availability of the stop-start switch, their presumed knowledge of the mandatory requirement for shutting the machinery down before performing maintenance work, and their employer's instructions. The Secretary discounts these considerations and the protective railing because of the ease with which it could be circumvented. At the same time, the Secretary asks me to ignore the ease with which the metal screen can be removed while the machinery is in motion. As the photographs and testimony show the screen was only partially bolted to the angle iron frame. A twisted metal wire held the two components of the screen together and

11/ The standard is an administrative not a statutory regulation issued under the authority of section 6 of the Federal Metal and Non-Metallic Mine Act of 1966, 30 U.S.C. § 725 (1976 ed.). See also 34 F.R. 12511 et seq. July 31, 1969. The administrative history indicates the standard was originally intended to prevent "inadvertant" or "accidental" contact with moving machine parts. See References 7 through 10 attached to Secretary's Brief.

to the angle iron frame at a point just opposite the pinch point (RX-1, 3). It is obvious that maintenance or any other work could be performed on the pulley with or without removing the guard (Tr. 203). Consequently, if failsafe protection was the justification for requiring the new screen guard it was clearly not achieved.

Reasonable men can and did disagree over the adequacy of the various methods of guarding the pulley. Inspectors Horn and Rostler thought the protective railing was adequate. Even Inspector Aubuchon admitted that a miner acting in a safety-conscious manner would not go inside the barrier while the pulley was in motion (Tr. 64). With the normative criteria in such disarray, unguided discretion cannot be accepted as affording the operator fair warning of what was required. As the Supreme Court has remarked, "Where, as here, there are no standards governing the exercise of discretion . . . the scheme [of enforcement] permits and encourages arbitrary and discriminatory enforcement." Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972); 2 Davis, Administrative Law Treatise, § 7:26 at 131 (1979). 12/

12/ Professor Davis contends that,

> Lack of standards or rules to guide discretion, in almost any setting, may encourage arbitrary and discriminatory action, as in the Papachristou case. Vagueness of enforcement policy or of any other policy may be unconstitutional because it permits arbitrary and discriminatory action; courts may accordingly require that the vagueness be corrected by guiding standards or rules. Id.

Aside from the suspicion of knowing evasion of the guards planted by the miner-informers, the inspector claimed to be privy to the fact that MSHA management had determined to upgrade the protection on pulleys because "they" believed the "barriers weren't doing the job" (Tr. 141). Because no objective or statistical evidence was adduced to support this conclusion, I find such loose, anecdotal evidence is entitled to little or no weight. 13/

I do take notice of the fact that because of the policy and political difficulties that attend the protracted rule-making process in an era of deregulation, MSHA has increasingly turned to adjudication as the best hope for improving or upgrading the mandatory standards, especially the general standards. 14/ In many instances it is easier to eschew the negative policy pitfalls of rulemaking and to proceed with ad hoc litigation because the choice is discretionary, largely unreviewable, and has been broadly approved by the Supreme Court, the courts of appeals and the Commission. SEC v. Chenery Corp., 332 U.S. 194, 202 (1947); NLRB v. Bell

13/ The record in neither this nor the rulemaking proceeding shows any correlation between the frequency of citation of this standard and the incidence of fatal or disabling injuries attributable to contacts with pinch points. How MSHA decided, therefore, that the protective railing barriers are inadequate is somewhat of a mystery. The determined effort to "upgrade" this standard without empirical evidence to support the need therefor is another instance in which the regulators seem to be engaged in an unceasing effort to build an ever expanding and intrusive body of rules from what appear to be unproven, if not unrealistic, premises.

14/ The metal and nonmetal standards are, however, the subject of a revised rulemaking proceeding that commenced in March

Aerospace Co., 416 U.S. 267, 294 (1974); Voegele Co. v. OSHRC, 625 F.2d 1075, 1079 (3d Cir. 1980); Arkansas-Best Freight Systems, Inc. v. OSHRC, 529 F.2d 649, 654 (8th Cir. 1976); United States Steel Corp., 5 FMSHRC 3, 5 (1983); Alabama By-Products Corporation, 4 FMSHRC 2128, 2129 (1982).

With respect to this standard MSHA is proceeding on both tracks. The notice of rulemaking specifically notes that the "most frequent public criticism of the standard is the impreciseness of the language and lack of clear definition of the terms" in which it is couched. 47 F.R. 10190, 10196 (March 9, 1982). 15/ Some of the more frequent of the public criticisms of the "imprecision" of the standard are to be found in the decisions of the Commission's trial judges and more recently the Commission itself. Mathies Coal Company, 5 FMSHRC 300 (1983), appeal pending; John Peterson,

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fn. 14 (continued)
1980. The proceeding reached the preproposal stage on February 11, 1983. Time for comment on the preproposals expired April 15, 1983. Comments on the preproposals will be considered and then an improved standard will issue to be followed by a further period for hearings and comment by the industry. Thereafter, final revisions will be issued to become law. It is expected this is at least a year or more down the road.

15/ In response to industry's expressions of concern over the ambiguity in the standard, MSHA's preproposal draft of .14-1 would change the standard to state that "exposed moving machine parts which may be contacted and which could cause injury shall be guarded to prevent a miner from inadvertently contacting those parts. Guarding is not required where the exposed moving parts are physically inaccessible and located out of the reach of miners." Mine Safety & Health Reporter, Current Report, p. 444, 2/23/83. The industry continues to press for a "reasonably foreseeable" standard. Mine Safety & Health Reporter, Highlights, p. 572, 4/20/83.

d/b/a Tide Creek Rock Products, 4 FMSHRC 2241 (1982); Basic Refractories, 2 MSHC 1597, 1598 (1981); Kincheloe and Sons, Inc., 2 FMSHRC 1570, 1571 (1980); Applegate Aggregates, 1 MSHC 2557 (1980); Texas Utility Generating Company, 2 MSHC 1028 (1980); FMC Corporation, 2 FMSHRC 1315, 1320 (1980); Lone Star Industries, 1 MSHC 2520 (1979); Massey Sand and Rock Company, 1 MSHC 2111, 2112 (1979); Central Pre-Mix Contrete Co., 1 FMSHRC 1424, 1430-31 (1979).

One need not agree with everything in these decisions to conclude there is a broad spectrum of concern on the part of the trial judges and among the commissioners over the imprecision of the language of the standard and the subjectivity of judgements made in citing guarding violations. 16/ Compare, Peabody Coal Company, 2 MSHC 1262-63 (1981). A distillation of these precedents leads me to conclude they foreshadow a holding by the Commission that the penumbra of liability does not extend to exposures that may result from

16/ In Mathies Coal, supra, the Commission in circumscribing the reach of the standard noted that:

> Like other statutes and regulations which allow monetary penalties against those who violate them, an occupational safety and health standard must give an employer fair warning of the conduct it prohibits or requires, and it must provide a reasonably clear standard of culpability to circumscribe the discretion of the enforcing authority and its agents. Quoting from Diamond Roofing Co. v. OSHRC, 528 F.2d 645, 649 (5th Cir. 1976). Accord, Phelps Dodge Corp. v. FMSHRC, 681 F.2d 1189, 1193 (9th Cir. 1982).

isolated, aberrational conduct or from a foolhardy or reckless disregard by a miner for his safety. Since such conduct is not forseeable or preventable, I find the condition cited fails to meet the reasonably prudent person standard fashioned by the Commission and the courts to save such charges from the void for vagueness ban. Mathies Coal, supra, and cases cited therein.

While remedial legislation is to be liberally construed, it cannot be stretched to cover every imaginative contingency that an inspector or MSHA can conjure up. 17/ A close reading of the Commission's precedents show there is an overwhelming consensus for limiting liability under this standard to contacts that may occur accidentally or inadvertently, i.e., negligently or thoughtlessly, by miners performing their routine or assigned duties in a reasonably, i.e., rationally, prudent manner.

I have deliberately refrained from any hair-splitting discussion of the meaning of the terms "guard" and "may." I think it clear beyond doubt that the protective railing or barrier was a "guard" within both common and dictionary

17/ This does not mean that in an appropriate case upon competent evidence an operator may not be held liable for knowingly, or willfully ordering or authorizing a miner to expose himself to contact with moving machinery parts. See section 110(c), (d) of the Act.

understanding. 18/ I also find the word "may" connotes in the abstract the mere possibility of a contact. 19/ What I have been unable to find is that when read in the context of due process notice it connotes a possibility, no matter how unforseeable or unpreventable of a deliberate, intentional or foolhardy contact. On the contrary, I find the barrier in question would cause even the most absent minded miner to stop, look and think. If then his thought was to proceed through heedless of the risk, I would absolve the operator of all responsibility in the absence of a showing that management had a hand in the action. It is, of course, reasonably forseeable that a foreman or other member of management may order or coerce a miner into disregarding any guard. Here, however, the Secretary failed to carry his

18/ The applicable generic definition is a "fixture or attachment designed to protect or secure against injury." Webster's 3d International Dictionary, p. 1006.

19/ In Mathies Coal, supra, Judge Merlin's decision (3 FMSHRC 1998, 2002) found that the phrase "may be contacted" meant "to be capable of being contacted" but that this did not include an "indeterminate degree of probability" and certainly not a "miner's aberrant behavior which could not be forseen or prevented by the operator and which harmed only himself." The finding of liability by the trial judge was predicated on his determination that the condition cited was hazardous to a miner "while performing his regular duties in a prudent manner." Id. 2001. Liability for a forseeable hazard having been established, the miner's "wantonly reckless and irresponsible behavior" served only to mitigate the operator's negligence and the amount of the penalty warranted. On appeal, the Commission reversed on the issue of liability finding the language of the standard too imprecise to cover the type of moving machine parts involved in the claimed violation.

burden of showing by competent evidence that such conduct on the part of this operator was forseeable or that the operator's standing safety instructions were a mere hollow mockery. The Secretary, of course, had the burden of showing the inadequacy of the barrier due to the likelihood of knowing or willful noncompliance by management.

Strict liability for noncompliance in providing no guard should not be levitated into an insurer's liability for unforseeable, unpreventable isolated and, on this record, wholly speculative incidents of idiosyncratic behavior by a supervisor. Compare, Ocean Electric Corporation v. OSHRC, 594 F.2d 396, 401 (4th Cir. 1979); Mountain States Tel. & Tel. v. OSHRC, 623 F.2d 155, 158 (10th Cir. 1980). This is not a case, therefore, for uncritical application of the rule that because the Mine Act is a strict liability statute it matters not that the mine operator exercised every reasonable precaution or that the violation was unforseeable. Domtar Industries, 3 FMSHRC 2345, 2348 (1981). When a violation is unforseeable because the standard fails to provide fair notice of what is prohibited the contention that unforseeability is immaterial encounters a due process limitation. I do not, therefore, read the Commission's decisions upholding nofault violations as mandating a holding that this standard imposes an open-ended liability to protect against the most remote, speculative and

aberrational kinds of conduct. Furthermore, if it does provide for such liability, I find the Secretary failed to carry his burden of showing that the new guard an improvement over the old guard or provided any greater protection against the real or imagined hazards testified to by the inspector. Finally, I find the Commission's decisions on strict liability 20/ can and must be harmonized with the fair warning requirement of the due process clause.

For these reasons, I reject as contrary to the intent of the standard the Secretary's claim that the operator is absolutely liable for even the most remote possibility imaginable of a harmful contact with the pinch point in question. Such a position is too arbitrary, capricious and subjective to merit adoption as a universal rule on this record. Instead, I find that under the Commission's decisions a rule of reason must prevail and that the Secretary must shoulder the burden of showing that an injurious contact is reasonably forseeable. The Secretary failed to carry that burden. I conclude, therefore, that since the guard provided was adequate to prevent negligent or even thoughtless employee contact with the pinch point in question the violation cited did not, in fact, occur.

20/ See, Nacco Mining Company, 3 FMSHRC 848 (1981); El Paso Rock Quarrier, 3 FMSHRC 35, 38 (1981).

The Secretary's evidence showed that a miner who stooped under the five foot high frame of the belt conveyor and then reached or stood up to a height of five feet five inches (65 inches) could bring his head, arms or some other part of his anatomy into contact with the self-cleaning tail pulley on the log washer conveyor. Based on this, the Secretary argues that whether or not it is reasonable to assume that a miner working in the vicinity of the conveyor frame would negligently or consciously contort himself so as to make contact with the pinch point a violation was shown because the pulley was not physically inaccessible. 21/

The operator's evidence showed that because the conveyor frame was only five feet high a miner could not thoughtlessly or negligently walk into the pinch point but would have to consciously stoop over and then reach or stand up to make contact. It further showed that when the pulley was in motion varying amounts of water, sand, and gravel fell off the end of the pulley and thus, in addition to the design of the equipment, this effluent provided a further natural deterrent against the likelihood that any miner acting

21/ The inspector found that contact was improbable and the Secretary conceded the violation was not such as to create a reasonable probability of a reasonably serious injury, supra p. 2.

rationally would negligently or inadvertently place himself under the five foot high frame of the belt conveyor while the pulley was in motion.

There was no dispute about the physical dimensions involved in the alleged violation. Accordingly, I find that because of the design and particular location of the pinch point in question it was not reasonably forseeable that it would be contacted by a miner performing his routine or assigned duties in a reasonably prudent manner. I agree that as the operator contends there was no possibility of a contact that might injure a miner when the machinery was not in motion and that to make a contact a miner would have to bend over to place himself under the five foot high frame (Tr. 279-280). 22/ I further find that while it was possible for a miner acting in a crazed or foolhardy manner to do this and to place his head or arms in contact with the pinch point while the conveyor was in motion and while water, sand, and gravel was falling in his face it was not reasonably forseeable that this would occur (Tr. 283-284).

22/ Where there was a conflict between the testimony of the inspector and the operator on the opportunity for contact and injury it was resolved in favor of the operator. I found the inspector's testimony too contradictory to lend credence to his speculation as to how contact and injury might occur (Tr. 282).

For these reasons, I find there was no reasonably forseeable potential for contact and injury. Compare Basic Refractories, 2 MSHC 1597, 1598 (1981); Duval Corp., 1 MSHC 2520, 2521 (1980); Texas Utility Generating Company, 2 MSHC 1028 (1980); Lone Star Industries, 1 MSHC 2167 (1979).

As I have previously indicated, it is one thing to impose strict or no-fault liability for reasonably forseeable possibilities but quite another to impose such liability for unforseeable, unpreventable acts of idiosyncratic or aberrational behavior amounting to conscious or reckless disregard for one's personal safety. On the one hand liability is imposed for failure of an operator to recognize as hazardous a condition which a reasonably prudent person familiar with all the facts, including those peculiar to the mining industry, would have recognized. On the other, liability is imposed on the basis of speculation that isolated, idiosyncratic behavior may occur. Again the Secretary seeks to subsume no-notice liability under the rubric of strict no-fault liability. The Secretary's attempt to impose no-notice liability under the guise of no-fault or strict liability violates fundamental tenents of fairness. The Secretary as enforcer of the Act has the responsibility to state with ascertainable certainty the outer limits of liability under a general standard. When he seeks to expand those limits

under the canon of liberal construction to no-notice liability he exceeds the limits of his authority and faces the salutary ban on arbitrary regulatory action erected by both administrative and constitutional due process. 2 Davis, Administrative Law Treatise, § 3:19 at 180 et seq. (1978); NLRB v. Majestic Weaving Co., 355 F.2d 854, 859-61 (2d Cir. 1966).

Thus, even if the distinction between a reasonably forseeable and unforseeable potential for contact and injury does not make safety-sense it is the standard as written which must bear the blame. The purpose of the Mine Act is to obtain safe and healthful working conditions in the nation's metal and non-metal mines by telling operators what they must do to avoid hazardous conditions. To strain the plain and natural meaning of the phrase "which may be contacted" to embrace any pinch point that is physically accessible for the purpose of alleviating a perceived lack of safety-consciousness on the part of miners or management is to delay the day when the regulation will be written in clear and concise language that all operators will be better able to understand and observe. See, Diamond Roofing v. OSHRC, 528 F.2d 645, 649-650 (5th Cir. 1976); Kropp Forge Co. v. Sect. of Labor, 657 F.2d 119, 122-124 (7th Cir. 1981);

Phelps Dodge Corp. v. FMSHRC, 681 F.2d 1189, 1192-1193 (9th Cir. 1982); Mathies Coal Company, 5 FMSHRC 300 (1983).

In Mathies Coal the Commission embraced the rule that the canon of liberal construction for remedial statutes does not override the requirements for "fair warning" citing the Phelps Dodge case supra. In Phelps Dodge the court applied the traditional rule that regulations that apply penal sanctions are to be narrowly construed, notwithstanding the fact that they appear in remedial statutes. And in Kropp Forge the court held that "without adequate notice in the regulations of the exact contours of his responsibility" an operator cannot be held liable for violating a safety standard. Compare Dravo Corporation v. OSHRC 613 F.2d 1227, 1234 (3rd Cir. 1980).

As I have indicated, I do not believe adjudication should be used as a substitute for rulemaking when it comes to promulgating substantive changes to the mandatory standards. 23/ Compare, Morton v. Ruiz, 415 U.S. 199 (1974). The duty of the Commission is to "construe these regulations, not create them

23/ The elaborate consultative procedures found in § 101 of the Act for the formulation of "improved" standards represented the Congressional answer to the fears expressed by industry and labor over the prospect of unchecked administrative discretion to make substantive changes. Zeigler Coal Company v. Kleppe, 536 F.2d 398, 402-403 (D.C. Cir. 1976).

ourselves." Marshall v. Anaconda Co., 596 F.2d 370, 377, n. 6 (9th Cir. 1979). Further I find it unreasonable to construe this standard as imposing strict liability for an operator's failure to provide failsafe, foolproof guards around the moving machine parts of drive, head, tail, and take-up pulleys. 24/ In language apropo of these circumstances, the Third Circuit noted that:

> In an adjudicatory proceeding, the Commission should not strain the plain and natural meaning of words in a standard to alleviate an unlikely and uncontemplated hazard. The responsibility to promulgate clear and unambiguous standards is upon the Secretary. The test is not what he might possibly have intended, but what he said. If the language is faulty, the Secretary has the means and the obligation to amend. Bethlehem Steel v. OSHRC, 573 F.2d 157, 161 (3d Cir. 1978).

Finally I reject as a justification for an "expansive" reading of the standard the oft repeated refrain that because experience shows that mine operators treat their workforce as mindless automatons the principles of fair warning and

24/ The comparable OSHA standard clearly and unambiguously requires pulleys be guarded by guards made of "expanded metal, perforated or solid sheet metal, wire mesh on a frame of angle iron, or iron pipe securely fastened to floor or to frame of machine." 29 C.F.R. 1910.219(d)(m)(o). This comes much closer to describing the type of foolproof guard the Secretary contends for than anything in the existing MSHA standards. I would think that without doing undue violence to the territorial imperative of either bureauracy the Secretary of Labor, who presides over both, might persuade MSHA and OSHA to consider adopting a unitary standard. I may be wrong but I would assume that whether it appears in an MSHA or an OSHA facility a pinch point is a pinch point is a pinch point.

notice with opportunity to comply should yield to what amounts to a post hoc rationalization for imposing liability without fault and without notice. As the Supreme Court observed in American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 539 (1981), such post hoc rationalizations of an agency cannot serve as a sufficient predicate for an enforcement action.

Citation 362889

The undisputed evidence shows that in July 1976, Inspector Harvey Osborn cited the operator for lack of a guard on the drive pulley of the dewatering screen--the same pulley involved in this citation which issued on August 9, 1979 some three years later (Tr. 376-377). Mr. Osborn suggested two pipe railing barriers be installed to bar inadvertant access to the drive pulley pinch point and when this was done the violation was deemed abated and the citation was terminated.

The adequacy of this guard was not questioned thereafter until Inspector Aubuchon decided the barrier approved by Inspector Osborn was inadequate and insisted it be replaced with two locked gates. The inspector's action was a self-initiated effort to upgrade or improve the guard because neither the standard nor the nature of the hazard had changed

in any way in the intervening three years. What had changed, of course, was the inspector.

Inspector Aubuchon sought to justify the requirement for the locked gates on the ground they would render the pulley area physically inaccessible, at least to his mind. He was wrong. Mr. Rhos, the plant superintendent, convincingly testified that neither the locked gates nor the pipe barriers would make the pinch point inaccessible. 25/ Each of the plant's seven employees had keys to the gates. Furthermore, the gates, like the pipe barriers, could easily be circumvented by climbing over, under or through them. Neither guard, therefore, provided failsafe, foolproof protection against thoughtless, foolhardy or wantonly reckless conduct by an employee. At best they would afford an employee an opportunity to stop look and think about the risk and to recall that the operator's standing safety instructions and the mandatory standards prohibited proceeding beyond the barrier while the machinery was in motion.

25/ An expanded metal guard was impractical because of the heavy vibration of the dewatering screen. This vibration would shake loose the welds or bolts of such a guard within a very short time, necessitating a burdensome replacement requirement. Both inspectors obviously recognized the cost-benefit of such a requirement could not be justified. Inspector Aubuchon found the potential for contact and injury was improbable and the Secretary conceded there was no reasonable probability of a reasonably serious injury.

I find Mr. Aubuchon's testimony as to the claimed improvement in protection and diminution in the potential for contact and injury was impugned by the undisputed evidence as to the physical circumstances and therefore, of no probative value.

For these reasons, I conclude the Secretary failed to prove by a preponderance of the reliable, probative and substantial evidence the violation charged. Compare, Basic Refractories, 2 MSHC 1597, 1598 (1980); Lone Star Industries, 1 MSHC 2167 (1979). I further conclude that in the absence of proof that the operator had notice as to the claimed insufficiency of the original guard and an opportunity to contest or comply, the inspector's action in issuing this citation was in excess of statutory authority, a clear abuse of discretion, and a violation of the right to fair warning of prohibited conduct. Diebold, Inc. v. Marshall, 585 F.2d 1327, 1335-1338 (6th Cir. 1978); Auto Sun Products, 9 OSHC 2009, 2012 (1981).

Opinion

I fully realize that a general standard like the guarding standard must be applied in a myriad of circumstances. But

so must common sense. As the Commission has held "even a broad standard cannot be applied in a manner that fails to inform a reasonably prudent person that the condition or conduct at issue was prohibited by the standard." Mathies Coal Company, 5 FMSHRC 300 (1983), appeal pending.

In this case we have circumstances in which guards had either previously been approved as adequate or the design and placement of the equipment was such that no person acting in a rational manner could be endangered. Further, the record shows that the so-called "improved" guards provided no additional protection against individuals bent on foolhardy, wantonly reckless or deliberately self-destructive acts. For these reasons, I conclude the standard as applied in each of these circumstances was so impermissibly imprecise as to fail to give the operator fair warning of the conduct or condition prohibited.

The claim that the operator had notice of MSHA's change in the guarding requirement is without merit. The two publications identified in the record as Government Exhibits 1 and 2 were issued long after the citations in question. Government Exhibit 2-A, which issued a year before the challenged citations, was an internal memorandum directed to district and subdistrict managers. There is no evidence the operator was aware of this document which in any event

addressed only the adequacy of chain barriers and warning signs, not protective railings or pipe barriers. Inspector Aubuchon's alleged verbal warnings were so vague, indefinite and contradicted by other inspectors and the prior pattern of administrative enforcement as to be unworthy of credence by the operator. I find therefore that at the time of issuance of these citations, in August 1979, the operator was not aware, nor should he have been aware, of any authoritative administrative, Commission, or judicial interpretation of the standard as requiring failsafe, foolproof guards. 26/

In a closely analogous factual context, the court of appeals in Diebold, Inc., supra, 585 F.2d 1335-1337, held that if on the basis of a prior pattern of enforcement an employer is led to believe that he is in compliance with a guarding standard, he cannot retroactively be held in violation of the standard in the absence of a showing that he was aware of an

26/ Professor Davis has preceptively observed that the true vice of an enforcement policy based on unannounced and uncontrolled discretion is that it encourages a regime of arbitrary and discriminatory enforcement of the law. The solution he suggests is judicially required rulemaking to the end that the "enormous power of selective enforcement" be brought under the intelligible control of a responsible governmental authority. 1 Davis, Administrative Law Treatise §§ 3:9, 3:15, pp. 180-181, 213-215 (1979). Section 101 of the Mine Act reflects an attempt by Congress to assure that enforcement policy is set in accordance with publicly announced policy to the end that operators be judged by uniform principles rather than administrative whim.

authoritative change in the enforcing agency's interpretation of the standard. Consequently, even if I were persuaded that the proffered interpretations of the standard are correct, that would not inexorably lead to the conclusion that the standard may be applied in the instant case. As the court noted:

> Among the myriad applications of the due process clause is the fundamental principle that statutes and regulations which purport to govern conduct must give an adequate warning of what they command or forbid. In our jurisprudence,
>
> > because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).
>
> The principle applies with special force to statutes which regulate in the area of First Amendment rights, but the due process requirement of fundamental fairness is hardly limited to that context. Even a regulation which governs purely economic or commercial activities, if its violation can engender penalties, must be so framed as to provide a constitutionally adequate warning to those who activities are governed. See Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35, 48-50 (1966); Boyce Motor Lines v. United States, 342 U.S. 337, 340 (1952).
>
> There is no doubt that the violation [charged] exposed Diebold to penalties . . . Our concern, therefore, is with the question whether the regulation gave Diebold sufficient warning that press brakes were within the scope of its point of operation guarding requirements. The question is to be answered, of course, 'in the light of the conduct to which the regulation is applied.' United States v. National Dairy Products Corp., 372 U.S. 29, 36 (1963). Moreover, the constitutional adequacy or inadequacy of the warning must be 'measured by common understanding and commercial practice.' (Citations omitted.)

The court then went on to hold that where an employer and an agency have agreed on a method of guarding it would "indulge a fiction having little relation to reality" to find it was proper to impose a duty on the part of the employer to inquire as to the adequacy of his compliance. Citing McDonald v. Mabee, 243 U.S. 90, 91, the court held that "Great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact." Id. at 1337.

On the undisputed facts of this case, I am unable to find that a duty of inquiry on the part of this operator had been triggered. The evidence shows that the Secretary's written interpretations were either issued long after the alleged violations occurred, were not germane, or were not brought to the operator's attention. Further, the record shows there was substantial dispute between Inspector Aubuchon and his colleagues over what constituted compliance. With the agency itself in such disarray over what the guarding requirement was in August 1979, I conclude that it would indeed indulge a fiction having little relation to reality to find Missouri Portland had received notice that MSHA had authoritatively determined that failsafe, foolproof guards were required as protection against the hazards presented by pinch points.

It may be experience has shown the only way to insure against fatal or disabling injuries as the result of miners

becoming entangled in pinch points is to require all such areas be guarded with foolproof enclosures. If that is so, advantage should be taken of the present rulemaking proceeding to promulgate an improved standard that specifically mandates failsafe, foolproof guards. This might be accomplished by incorporating the MSHA Guide to Equipment Guarding (GX-1). This guide, of course, was not in existence at the time the conditions challenged in this case arose. What is even more disturbing, however, is the fact that the preproposal standard issued February 11, 1983, long after this case was tried, makes absolutely no reference to the MSHA Guide. Thus while the Secretary urges me on the one hand to hold the operator to the guarding requirements of the MSHA Guide he apparently thinks so little of it that he has not incorporated it into his proposal for an improved standard. It is this type of uncoordinated, inconsistent, standardless enforcement action that leads to industry's cry for clarification, reform and more even handed treatment. Uncritical, some might say selective, enforcement serves only to discredit the entire regulatory program.

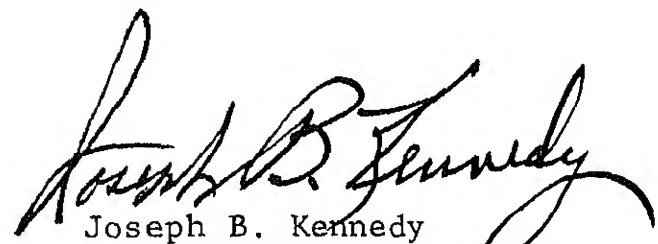
In the case of each of these citations, it appears that neither the inspector nor the solicitor was fully acquainted with MSHA's previous pattern of enforcement; failed to appreciate the fact that the so-called improved guards did not provide foolproof protection; and blindly assumed the

trial judge was required to find a violation because the pinch points were physically accessible. The solicitor should realize he assumes a heavy burden of persuasion when he asks the trial judge to uphold redundant citations for conditions previously abated without change in the hazards addressed. Such prosecutions prima facie do violence to the requirement of fundamental fairness and fair play.

A violation of due process can occur as much by harassment as by other more obvious means. The Government is not a ring-master for whom individuals and corporations must jump through a hoop at their own expense each time it commands. Vigorous enforcement is to be commended; vexatious enforcement must be curbed.

Order

The premises considered, it is ORDERED that the challenged citations be, and hereby are, VACATED; the proposals for an assessment of penalties DENIED: and the captioned matter DISMISSED.



Joseph B. Kennedy
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

MAY 17 1983

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 82-328
Petitioner	:	A.C. No. 36-04281-03501
v.	:	
	:	Dilworth Mine
UNITED STATES STEEL MINING CO., INC.,	:	
Respondent	:	

DECISION

Appearances: Covette Rooney, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Petitioner; Louise Q. Symons, Esq., Pittsburgh, Pennsylvania, for Respondent.

Before: Administrative Law Judge Broderick

STATEMENT OF THE CASE

In this case, the Secretary seeks to have civil penalties assessed for two alleged violations of mandatory safety standards: one cited on April 19, 1982, alleging a violation of 30 C.F.R. § 75.316; the other cited on June 1, 1982, alleging a violation of 30 C.F.R. § 75.400. A notice of hearing was issued February 22, 1983, scheduling this case (and 5 other cases involving the same parties) for hearing commencing April 27, 1983, in Uniontown, Pennsylvania.

On March 31, 1983, the Secretary filed a motion to approve a settlement agreement covering the two alleged violations. The motion stated that the "significant and substantial" characterization on the two citations had been deleted and the penalty for each violation was reduced pursuant to 30 C.F.R. § 100.4 to $20 from the original assessments of $158 and $112 respectively.

By order issued April 4, 1983, I denied the motion.

The case was heard on the merits on April 29, 1983. James Lough and Robert Newhouse, Federal Coal Mine inspectors, testified on behalf of Petitioner. James R. Williams testified on behalf of Respondent. Respondent has submitted a posthearing brief on the issue whether the Commission is bound by MSHA regulations providing a $20 penalty for violations which are not significant and substantial. Petitioner declined to file a brief on the issue.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Respondent is a large operator. The parties have stipulated that the imposition of penalties will not affect Respondent's ability to continue in business. With respect to both citations, Respondent abated the violations promptly and in good faith. Between June 1980 and June, 1982, Respondent's history shows five paid violations of 30 C.F.R. § 75.316 and 10 prior paid violations of 30 C.F.R. § 75.400.

CITATION 1144514

On April 19, 1982, a citation was issued to Respondent alleging a violation of 30 C.F.R § 75.316. Respondent was cited for having a metal stopping separating the belt conveyor entry and the intake escapeway in violation of the approved ventilation plan. The condition was abated and the citation terminated by the construction of a masonry stopping between the two entries, within the 3-day abatement time.

There is no question but that the condition cited was a violation of the ventilation plan. The fact that it had existed for many years without being cited is not a defense. The inspector testified that the condition did not pose a hazard, and on the basis of his testimony, I find that the violation was not serious. However, the violation was known or should have been known to Respondent. Therefore, it was caused by Respondent's negligence. Based on a consideration of the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for the violation is $75.

CITATION 1146067

On June 1, 1982, a citation was issued to Respondent alleging a violation of 30 C.F.R. § 75.400 because of an accumulation of loose dry coal and float coal dust under and around the tailpiece. The accumulations were up to 24 inches deep, 14 feet long and 6 feet wide. The mine was idle and the belt was not in operation. Twelve miners including a foreman were working in the area however. The section had been idle since March 24, 1982. Because of the absence of sources of ignition, the inspector was of the opinion that the condition did not pose "a significant hazard" of injury. The condition was obvious to visual observation. It was known or should have been known to Respondent. Therefore it resulted from Respondent's negligence. Based on a consideration of the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for the violation is $75.

THE EFFECT OF 30 C.F.R. § 100.4 ON THE COMMISSION'S JURISDICTION TO ASSESS PENALTIES

On May 21, 1982, MSHA adopted new regulations on the criteria and procedures for civil penalty assessment.

30 C.F.R. § 100.4 provides as follows:

> An assessment of $20 may be imposed as the civil penalty where the violation is not reasonably likely to result in a reasonably serious injury or illness, and is abated within the time set by the inspector. If the violation is not abated within the time set by the inspector, the violation will not be eligible for the $20 single penalty and will be processed through either the regular assessment provisions (§ 100.3) or special assessment provisions (§ 100.5).

The Respondent argues (1) that any violation not cited as "significant and substantial" comes under this provision and must be assessed as a "single penalty" at $20, and (2) the Review Commission is bound by MSHA's assessment regulation. Respondent asserts that in rejecting the proposed settlement in this case, I attempted to create a violation undefined and unknown to the law called a "token violation." In fact, the term token is a rather common adjective, the meaning of which is much more obvious than the term "single penalty." Neither term, however, is included in the criteria in section 110(i) of the Act by which I am bound in assessing civil penalties.

I conclude as follows:

1. Whether a cited violation is checked as a significant and substantial violation is per se irrelevant to a determination of the appropriate penalty to be assessed. As an aside, I believe it was a mistake for the Commission to review the propriety of a significant and substantial designation on citations in contested penalty cases.

2. The Commission is not bound by the Secretary's regulations setting out how he proposes to assess penalties. Secretary v. Sellersburg Stone, 5 FMSHRC 287, 291 (1983):

> "Thus in a contested case the Commission and its judges are not bound by the penalty assessment regulations adopted by the Secretary. Rather, in a proceeding before the Commission the amount of the penalty to be assessed is a de novo determination based on the six statutory criteria specified in section 110(i) of the Act . . . ."

3. My assessment of the penalties herein is based on the following criteria:

(a) Respondent is a large operator;
(b) Respondent was negligent in permitting each of the violations to occur;
(c) a penalty will have no effect on Respondent's ability to continue in business;
(d) the violations were not serious;
(e) Respondent has a moderate history of previous violations;
(f) Respondent showed good faith in attempting to achieve rapid compliance.

ORDER

Based upon the above findings of fact and conclusions of law, Respondent is ORDERED to pay the sum of $150 within 30 days of the date of this decision for the two violations found herein to have occurred.

James A. Broderick

James A. Broderick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
333 W COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

MAY 23 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	)	CIVIL PENALTY PROCEEDING
v.	)	DOCKET NO. WEST 79-122-M
RIO ALGOM CORPORATION, Respondent.	)	MSHA Case No. 42-00677-05005
	)	MINE: Lisbon

DECISION

Appearances:

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For the Petitioner

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For the Respondent

Before: Judge Virgil E. Vail

STATEMENT OF THE CASE

This proceeding arose through the initiation of an enforcement action brought pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1978), (hereinafter the "Act"). The Secretary of Labor, Mine Safety and Health Administration (hereinafter "the Secretary") seeks an order assessing a civil monetary penalty against the respondent for

its violation of 30 C.F.R. § 57.3-22. 1/ Specifically, the Secretary alleges that the part of the standard which was violated is that part which requires: "Ground conditions along haulageways and travelways shall be ... supported as necessary" (Pet. Br. at 1). Rio Algom Corporation duly contested the proposed assessment, and a full hearing on the merits was held. Both parties filed post hearing briefs. To the extent that the contentions of the parties are not incorporated in this decision, they are rejected.

PROCEDURAL BACKGROUND

On January 29, 1979, in the course of an investigation of an unintentional roof fall at the respondent's Lisbon Mine, MSHA inspector Ronald Beason issued Order No. 336661, pursuant to section 107(a) and 104(a) of the Act, alleging that respondent violated 30 C.F.R. § 57.3-22.

Respondent filed an application for review of the order issued under 107(a) of the Act and a hearing was held on September 5, 1979, before Administrative Law Judge Forrest E. Stewart. The sole issue considered and determined by Judge Stewart in that case was whether on January 29, 1979 an imminent danger existed in the Lisbon Mine which warranted a withdrawal of the miners. Judge Stewart stated in his decision dated January 29, 1980 as follows: "A finding need not be made, therefore, as to whether a violation of section 57.3-22 existed. Such a finding would not be determinative of the issues in this case." Judge Stewart decided that the issuance of a 107(a) withdrawal order was the appropriate action taken in view of the facts presented. Rio Algom Corporation, 2 FMSHRC 187 (January 1980)(ALJ) Docket No. DENV 79-347.

On September 18, 1979, the Secretary filed a petition for the assessment of a civil penalty based upon the Citation/Order No. 336661 issued January 29, 1979 alleging respondent violated 30 C.F.R. 57.3-22 of the Act and proposing a civil penalty of $445.00.

1/ Mandatory. Miners shall examine and test the back, face, and rib of their working places at the beginning of each shift and frequently thereafter. Supervisors shall examine the ground conditions during daily visits to insure that proper testing and ground control practices are being followed. Loose ground shall be taken down or adequately supported before any other work is done. Ground conditions along haulageways and travelways shall be examined periodically and scaled or supported as necessary.

On October 12, 1979, respondent filed an answer to the proposal for assessment of civil penalty stating that it had received the order of withdrawal No. 336661 but at no time was a citation issued. Respondent also alleged that all issues were litigated in the case involving Docket No. DENV 79-374 before Judge Stewart and that petitioner is estopped from bringing this action to enforce a civil penalty and is barred by laches from seeking to issue a citation or impose a penalty based upon order No. 336661.

On January 28, 1981, respondent filed a motion to dismiss the proposal for assessment of a civil penalty and to vacate the hearing based upon the grounds that No. 336661 was an order of withdrawal and not a citation and that the matter was so determined in the hearing before Judge Stewart. Petitioner filed a memorandum in opposition to respondent's motion wherein he contended an order and citation may be issued for the same facts and that respondent was issued a citation and order concurrently for the same conditions that gave rise to the 107 imminent danger order. Respondent filed its reply alleging that the petitioner had included factual inaccuracies with respect to the procedural background, that all issues concerning 336661 had been litigated and are res judicata, and that these proceedings under Docket No. WEST 79-122-M violated its rights.

On February 11, 1981, petitioner filed a motion for partial summary decision requesting a decision be issued holding that respondent had violated 30 C.F.R. 57.3-22 based upon the findings of facts and conclusions of law in Judge Stewart's decision and that only the amount of the penalty needed to be tried in the present case. Respondent filed a reply arguing that the motion was not timely filed and that genuine issues as to material facts remain in the present proceeding.

On February 20, 1981, this Judge issued an order, having considered all of the above motions and arguments, finding that in the prior case, Docket No. DENV 79-347, Judge Stewart had denied a similar motion by respondent to dismiss and vacate the citation, or, in the alternative for a summary judgment and had proceeded to hear and decide that case on the sole issue of whether an imminent danger existed in the mine which warranted a withdrawal of the miners. Further, Judge Stewart did not consider or dispose of the issue as to whether a violation of a safety standard occurred. Also, the Federal Mine Safety and Health Review Commission had considered a similar set of facts and decided that the Act mandates assessment of a penalty for a violation of mandatory safety standard whether that violation is alleged in a citation issued under 104(a), or in a withdrawal order issued under section 104(d) or other section of the Act. Island Creek Coal Company, 2 FMSHRC 279 (February, 1980), Van Mulvehill Coal Company, Inc., 2 FMSHRC 283 (February, 1980). Both respondent's and petitioner's motions were denied.

Upon commencement of the hearing in the present case, respondent made a motion in the nature of motion in limine to restrict the receipt of any evidence in this case related to a violation of a standard and renewed the arguments made in its earlier motions. I denied respondent's motion at that time for the same reasons stated in my prior order dated February 20, 1981. At this point, having had the benefit of hearing all of the evidence presented at the hearing, reviewing the record in the prior case heard and decided by Judge Stewart, and weighing the arguments of the parties presented in their pleadings prior to the hearing and arguments at the hearing, I conclude that my prior order of February 20, 1981 is valid and adopt its reasoning and authorities therefore without restating the full text herein.

FINDINGS OF FACT

1. At all times pertinent to this proceeding, respondent was the owner and operator of an underground uranium mine near LaSalle, Utah, known as the Lisbon Mine.

2. The operator employed approximately 120 people including supervising personnel. The mine operated on a 24 hour basis with the day shift commencing at 8:00 a.m.

3. On Wednesday, January 24, 1979 [2]/ at approximately 10:30 a.m., a roof fall occurred at the Lisbon Mine in the 13 North and 18 North drift area near the 911 shop. This is part of the 1 and 11 contract areas where production of ore was in progress. The 911 shop was used to service and repair the 911 loader.

4. The material from the roof fall extended for a distance of 40 feet down the drift and was of such a height that a miner standing on the floor of the drift could not see over it. It was as wide as the drift except for an area on the east side that was open to passage by reason of cribs that remained standing after the fall (Tr. at 206).

5. Miners continued working in the 1 and 11 contract area following the roof fall on January 24 until 10:00 a.m. on the following day January 25, a period of 23 1/2 hours (Tr. at 162). Some miners set additional timbers near the shop so that the 911 loader, tools, and equipment could be extracted. Other miners continued working at driving the 13 North drift and in production in the 18th North drift area.

6. On Thursday, January 25, Charles B. Pearson, respondent's safety supervisor arrived at the mine and upon learning of the roof fall proceeded underground to inspect the area. At approximately 10:00 a.m. all miners were withdrawn from the 13 North drift and 18 North drift area (Tr. at 216).

2/ All dates are in 1979.

7. On Sunday, January 28, MSHA inspector Donald L. Beason received a report from a miner that a roof fall had occurred at the Lisbon Mine on January 24. This occurrence had not been reported by respondent to MSHA as of that date and time (Tr. at 29-30).

8. On Monday, January 29, Beason arrived at the Lisbon Mine to investigate the reported roof fall and went underground accompanied by Mervyn Lawton, manager and president of Rio Algom, John Vancil, mine superintendent, and Charles Pearson. As a result of his inspection, Beason issued Order/Citation No. 336661 to respondent citing four areas in the mine as presenting an imminent danger to miners and a violation of mandatory safety standard 57.3-22. The four areas were 13 North 4 East Pillar, 13 North 6 West, 13 North 7 West, and 13 North 7 West through 4 West. 3/

9. During his inspection Beason observed in the 13 North 4 East area ten 8 x 8 timber sets all showing caps pressed down into the posts with one cap deflected and showing a 3 3/4 inch gap in the center. Also, 25 roof bolts were without plates (Tr. at 38-39). At 13 North 6 West, Beason saw five sets of 8 x 8 timbers with caps pressed down into the posts and "smashing" of the caps on the first set splitting the post (Tr. at 43-33). Also, 13 roof bolts of the split set type were observed with rings broken and plates missing (Tr. lt 45). At 13 North 7 West intersection, a caved area was encountered which was 10 to 12 feet in width and extended 25 feet into the 13 North drift. It occupied the full width of the drift but the inspection party could climb over the muck pile to get by. The rock that fell had extended above the anchor points of the roof bolts. This was not the roof fall that occurred near the 911 shop area on January 24 but was a fall that occurred sometime between January 25 and the day of the inspection (Tr. at 46-47). In the 13 North haulage drift between 7 West and 4 West crosscuts, Beason saw plates stripped off of the roof bolts and cracks in the plates. The wire mesh incorporated with the roof bolts for roof control was bowed out. This area is a travelway in the mine (Tr. at 49-50). Other areas cited by the inspector were access routes in this area of the mine (Tr. at 51).

3/ These areas were located on Petitioner's Exhibit No. 1 as follows:

"A" 13 North 4 East pillar (Tr. at 41).
"B" 13 North 6 West (Tr. at 43).
"C" 13 North 7 West (Tr. at 46).
"D" 13 North 7 West through 4 West (Tr. at 50).

10. On January 29, the day the imminent danger withdrawal order was issued, no miners were present in the area covered by the order as all miners had been withdrawn by the respondent four days prior thereto.

11. Beason had inspected the Lisbon Mine several times prior to the roof fall on January 24. On August 1, 1978 he issued a citation and suggested that the area described as 18 South haulage drift located near the 911 shop area should be monitored for roof support (Tr. 62 and Exhibit P-2). On January 11, 1979, Beason issued a citation to the respondent covering an area described as 18 South Main and 15 East Fuel drift and 5 East 11 North. This is an area 50 to 75 feet from the 911 shop on the same haulageway. The respondent was cited for loose unconsolidated material on the brow of 18 South main and also 5 East needing attention (Tr. 6 and Exhibit P-3). On January 15, 1979, Beason returned to the 1 and 11 contract area of the Lisbon Mine and walked the travelway into 13 North drift near the 911 Shop. Based upon this inspection, he terminated the citation issued January 11 (Tr. at 134, 140).

ISSUES

The issues in this case are whether the respondent violated mandatory safety standard 30 C.F.R. 57.3-22, and, if so, the appropriate amount of the civil penalty which should be assessed for such violation pursuant to section 110(a) of the Act.

DISCUSSION

The precise question before me is whether respondent violated that portion of section 57.3-22 which states that "Ground conditions along haulageways and travelways shall be ... supported as necessary." Petitioner contends that the roof fall in 13 North 7 West would not have occurred if the roof had been adequately supported and that the inspector's observation of conditions in the other areas incorporated in the order/citation and a history of two roof falls within five days in the area cited as indicative of a lack of adequate support (Pet. Br. at 3).

Respondent has challenged the citation in controversy for the following reasons: (1) the area affected by the citation did not involve a haulageway or a travelway; (2) that there is no evidence that ground support was inadequate; and (3) that petitioner cannot penalize respondent for conditions as they existed on January 29 when the inspector first observed them for the reason that all mining had ceased and miners withdrawn from the area on January 25.

Based upon a careful review of the testimony of witnesses, exhibits, and arguments of counsel, I reject the respondent's arguments and find that a violation of the cited standard occurred. The most credible evidence of record shows that inspector Beason was experienced, both as a miner and mine inspector, having worked ten years as a miner and supervisor in various mines and seven years as a mine inspector. Also, prior to the occurrence involved

in this matter, Beason had inspected the Lisbon Mine on several occasions and issued citations and warnings to the operator's management regarding loose ground along haulageways including the fuel drift near the 911 shop and the area near where the second roof fall was discovered (Finding of Fact No. 11).

Beason testified that upon entering the mine on January 29 to investigate the first roof fall, he discovered that a second fall had occurred sometime between January 25 and 29 in what is considered an access route of the mine. Also, he observed areas designated as 13 North 4 East, 13 North 6 West, and 13 North 7 West through 4 West showing evidence of ground movement. This involved caps being mashed down on tops of posts, caps that were cracked and roof bolts being stripped of their plates.

Pearson, respondent's safety superintendent, testified that he accompanied Beason underground on the January 29 inspection and observed a cap on a post cracked and caps compressed on posts in the 13 North 4 East area, the cave in the 13 North 7 West area which he hadn't seen before, roof bolts with plates stripped in the 13 North 6 West area, and split sets stripped of their plates in the 13 North 7 West area (Tr. 153-158). Pearson admitted that he withdrew miners from the 1 and 11 contract areas on January 25 because he was concerned about the difficulty that could be encountered evacuating an injured person due to the fall at the 911 shop and also because of the ground movement in the area (Tr. at 164).

In light of the foregoing, I am persuaded that the conditions observed by Beason on January 29 and Pearson on January 25 indicated there was unstable ground conditions in the area cited which indicated additional support was needed in the travelways and haulageways. I have considered the testimony of respondent's witness Lawton wherein he testified that the conditions observed by Beason involving a "bent" cap or the cracked cap did not indicate the area was taking excessive weight or had he observed any roof bolts on split sets stripped of their plates or deflected caps along the route he traveled on January 24. Also, Lawton stated that the first roof fall had nothing to do with the second fall discovered on January 29 (Tr. 361-382). From a review of this conflicting testimony, I find that the conditions observed and described by Beason on January 29 and Pearson on January 25 are more credible as to the conditions in the area involved in this citation.

Respondent contends that the conditions observed by Beason on January 29 should not be controlling as the miners had been withdrawn on January 25 and mining discontinued in the cited area. Admittedly, Beason was not in the mine on January 24 when the first fall occurred or January 25. However, I am convinced that the more credible evidence in this case supports the basis upon which the inspector issued the citation involved herein. Beason had prior experience inspecting this area and had previously issued citations and warnings for ground control. He had conversations with members of management as to the conditions existing on January 24 and 25 and the opportunity on January 29 to personally observe the conditions of the ground support in the area including the caps that were cracked and the plates stripped from the roof bolts.

The specific question is whether the travelways and haulageways in the cited area were adequately supported between January 24 at 10:30 a.m., when the first roof fall occurred at the 911 shop, and January 25 at 10:00 a.m. when Pearson ordered the miners withdrawn from the area. This was a period of time when miners continued working in the area in an attempt to cut through a drift in 13 West and also to remove tools and equipment from the 911 shop area. Several of respondent's witnesses testified that they were of the opinion that the area was properly supported during this period. However, I find that the most credible evidence shows that two reasons existed for the miners to continue to work in the area following the fall at the 911 shop. First, management wanted to complete the mining cycle in the 13 North drift to meet the miners who were drilling through from the other side (Tr. 340). Second, management wanted to remove the 911 machine and other equipment from the 911 shop area. Assuming, that there is some merit to respondent's contention that the area was closed by the operator on January 25 for the reason that there was inadequate access routes for removing an injured miner on a stretcher should an accident occur, the fact remains that for 24 hours men were permitted to work in an area where an unexpected roof fall had occurred in a travelway and where previous warnings and citations had been issued because of ground movement. Also, four days later, a second fall was discovered as well as other evidence involving unsafe roof bolts and caps on posts in the area indicating ground movement. From the above circumstances, I conclude that from January 24 through 25, ground conditions along haulageways and travelways were not supported as necessary and the area presented the potential of an injury or death to miners working there. Respondent argues that because the area had been closed on January 25, the locations cited were not haulageways and travelways on January 29, the day of the inspection. The fact is though that for the period from January 24 through 25, the cited areas were being used for this purpose and that is the time period pertinent to this violation.

Supporting its case for vacating this citation, respondent cites the decision of Judge Boltz in Secretary of Labor v. Homestake Mining Company, 2 FMSHRC 3630 (December 1980)(ALJ). In that case, it was found that the operator had taken steps to provide adequate ground support in the normal sequence of its mining operation and that the Secretary had failed to sustain the burden of proof to support a violation. I do not find any discrepancy between that decision and the findings made in this case. The question is one of weight of evidence and proof. In the Homestake case, the post that showed a crack was a "tie" and not used to support weight. In the present case, the timbers involved that showed evidence of taking weight were designed and installed as support and not as a "tie."

I find no merit in respondent's argument that a citation should not be issued for a condition that existed during a period of time prior to the day of inspection. In this case, respondent argues that the conditions observed by the inspector on January 29 were different from those that existed four days earlier as the area had been closed and not maintained during this period. This argument, if strictly followed, would preclude much of the enforcement effect of the Act. As an analogy, often the determination of the

cause of an accident, such as an explosion in a mine, is predicated upon the reconstruction of events that led up to the occurrence in question. To do this, it is necessary to rely upon known facts and testimony of witnesses whose knowledge is based upon an expertise in the matter involved. In this case, the knowlege, observations, and opinion of inspector Beason are believed to be most credible as to the alleged violation. In Old Ben Coal Company v. Interior Board of Mine Operation Appeals, 523 F. 2d 25 (7th Cir. 1975), the Court held that an inspector is entrusted with the safety of miners lives, and he must ensure that the statute is enforced for the protection of these lives. The decisions of the inspector, unless there is evidence that he has abused his discretion or authority, should be supported. In this case, I find no evidence that the inspector either abused his discretion or authority and find that the respondent violated the cited standard.

PENALTY

Petitioner argued at the hearing and in his brief that the penalty originally proposed by the assessment office in the sum of $445.00 should be increased to $4,450.00. As a basis for this, petitioner argued that the respondent had received verbal and written warnings from the inspector prior to the first cave-in and still continued working the miners in a hazardous area following said roof fall.

Section 110(i) recites that the Commission shall have the authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, we shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of the violation.

History

The history of prior violations in this case involve the citations and warnings that had been given to the respondent prior to the unexpected roof fall that occurred on January 24 (See Finding No. 11). Also, a citation was issued to respondent for failure to report the above roof fall which was not a part of this contested citation. Also, consideration must be given to the fact that the area involved had a good safety record, having one injury involving a broken leg reported in 1978 and no other lost time accident since that date (Tr. 219-222).

Size

The respondent employs approximately 120 miners at the mine which included supervisory personnel (Tr. 12 and Finding No. 2). I would consider this a medium sized mining operation.

Effect On Operator's Ability to Continue in Business

The record does not reveal that the imposition of a reasonable penalty in this case would cause a hardshop on the operator's ability to continue in business and in the absence of such proof, it is presumed it would not.

Negligence

I am convinced that the respondent was negligent in this case in allowing miners to continue to work in the area cited following the roof fall on January 24. Respondent's witnesses testified that they did not believe there was a danger here following the first fall at the 911 shop and that they had monitored the area during this time. Also, that the reason for the respondent withdrawing the miners on January 25 was the lack of a proper access for removing an injured man should an accident occur and not because of the condition of the roof in the area. I will not recite In Haec Verba, the statements of respondent's witnesses on this matter, but find these statements to be at odds with the statements of Beason and Pearson. I find that the history of the area, the prior violations and warnings, the first roof fall on January 24, and conditions of the roof support as described by Beason to be evidence of negligence on the part of respondent. Also, in continuing to require the miners to work in the area to extricate equipment and tools and to continue drilling in 13 North drift is further evidence of a negligent attitude on the part of respondent.

Gravity

The gravity of the violation in this case involved the respondent's working miners for a period of 24 hours following a roof fall on January 24. Also, the area that the miners worked in had only two possible escape routes, one involving the fall at the 911 shop area which blocked most of the drift and a second route through areas earlier described in the citation as showing ground movement and where a subsequent roof fall was discovered on January 29 (Tr. 167). I find that these practices were serious and posed a grave risk to these employees.

Good Faith Compliance

The record shows that the area had been closed and miners withdrawn on January 25, four days prior to the inspector issuing the withdrawal order/ citation involved in this case. The question of good faith compliance is not involved here as the respondent did not reopen the area for several months thereafter.

I reject the petitioner's recommendation as to the amount of the proposed penalty. Commission Rule of Procedure 29(b) provides:

> In determining the amount of the penalty neither the judge nor the Commission shall be bound by a penalty recommended by the Secretary ....

29 C.F.R. § 2700.29(b). Thus, in a contested case the Commission and its judges are not bound by the penalty assessment regulations adopted by the Secretary. Rather, in a proceeding before the Commission the amount of the penalty to be assessed is a de novo determination based on the six statutory criteria specified in section 110(i) of the Act and the information relevent thereto developed in the course of the adjudicative proceeding. Sellersburg Stone Company, 3 FMSHRC 291 (March 1983). Although, I reject the amount of increase in the penalty suggested by the Secretary in this case, I find from the facts developed during the hearing that some increase in the amount of the penalty over that originally proposed by the administration is warranted. I am persuaded by the evidence of record that some members of respondent's management evidenced a lack of proper concern for the health and safety of miners required to continue working in the cited area for a 24 hour period following the roof fall at the 911 shop area. This area had been cited by MSHA on several previous occasions as showing evidence of an unstable roof and some ground movement. The unexpected roof fall occurred in a travelway regularly used by miners going to and working around the 911 shop area. Also, management had the opportunity to observe the roof in this area immediately prior to the fall and failed to perceive its potential for collapse, in spite of the support that had been installed to control it. This fall should have been a warning of the general conditions that existed throughout the 1 and 11 contract areas. However, management ignored this situation and continued to work miners in the area both in attempting to complete the mining cycle in the 13 North drift and in removing equipment and tools from the 911 shop. This work continued until the respondent's safety superintendent arrived underground to investigate the fall and determined the area should be closed and the miners withdrawn. I find that working miners in the area following the roof fall was gross negligence on the part of the respondent and is the basis for an increase in the amount of the penalty over that originally assessed in this case.

Based on the above findings and discussion, I conclude that the appropriate penalty for the violation found is $800.00

CONCLUSIONS OF LAW

1. I have jurisdiction over the subject matter and the parties to this proceeding.

2. Respondent violated 30 C.F.R. § 57.3-22 as alleged by the Secretary of Labor.

3. The appropriate penalty for the violation is $800.00.

ORDER

Respondent is ORDERED to pay the sum of $800.00 within 40 days of the date of this decision.

Virgil E. Vail
Administrative Law Judge

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MAY 25 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. CENT 82-101-M
	:	A.C. No. 29-01869-05001 H QU4
v.	:	
	:	St. Cloud Mine
TODILTO EXPLORATION & DEVELOPMENT CORPORATION, Respondent	:	

DECISION

Appearances: Richard L. Collier, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner; George F. Warnock, President, Todilto Exploration and Development Corporation, Albuquerque, New Mexico, for Respondent.

Before: Judge Melick

This case is before me upon the petition for assessment of civil penalty filed by the Secretary of Labor, pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act" for one violation of the regulatory standard at 30 C.F.R. § 57.3-22. The general issue before me is whether the Todilto Exploration & Development Corporation (Todilto) has violated the cited regulatory standard and, if so, whether that violation was "significant and substantial" as defined in the Act and as interpreted by the Commission in Secretary v. Cement Division, National Gypsum Co., 3 FMSHRC 822 (1981). If it is determined that a violation has occurred, it will also be necessary to determine the appropriate penalty to be assessed.

On February 23, 1982, MSHA inspector William Tanner Jr., issued a combined withdrawal order and citation under sections 107(a) and 104(a) of the Act respectively. The validity of the order is not in itself at issue in this civil penalty proceeding. See Secretary v. Wolf Creek Collieries Co., PIKE 78-70-P (March 26, 1979); Pontiki Coal Corporation v. Secretary, 1 FMSHRC 1476 (October 1979). The order/citation alleged as follows:

> Loose material was hanging on the ribs and back from the No. 1 crosscut to the face which is 230 feet. The back where the loose was hanging ranges between 9 to 16 feet high. Four men working for the contractor and three men of the operator's were in this immediate area.

The cited standard provides in relevant part as follows:

Loose ground shall be taken down or adequately supported before any other work is done. Ground conditions along haulageways and travelways shall be examined periodically and scaled or supported as necessary.

The essential facts are not in substantial dispute. It is the conclusion to be drawn from the facts primarily concerning the gravity of the violation that is at issue. Todilto admits that a violation occurred but contends that it was a minor violation of loose rock on the back and ribs and argues accordingly that the hazard was low in gravity not warranting even the $500 penalty proposed by MSHA.

In February 1982, Todilto was the primary contractor for the development of the St. Cloud Mine. At the time of the inspection at issue it had developed a decline tunnel to a length of approximately 1,650 feet. According to Inspector Tanner, he and Inspector Dennis Heater arrived at the mine at around 9:30 or 10:00 on the morning of February 23rd, 1982. They were met about 30 minutes later by Todilto president George Warnock and mine superintendent Ron Ingimundson. The group proceeded to inspect the mine. Around 1400 to 1500 feet into the mine, they observed a piece of rock about one cubic foot in size and weighing about 140 pounds protruding from the "back" or roof. Warnock directed a workman to bring the rock down and it was done. Further into the tunnel, Tanner saw another rock protruding from the roof. This one was about 6 inches thick and 18 inches in diameter located some 210 to 230 feet from the face. Within this general area Tanner found seven places on the roof and nine on the ribs that consisted of sharp, abrasive and loose rock. It was all located at least 9 feet from the floor.

According to Tanner, eight employees were working in the general vicinity of these loose rocks. He opined that if such rock material should fall it could cause serious injuries or death. Indeed he cited an incident that had recently occurred at the St. Cloud Mine in which a rock only the size of a baseball struck a miner on the back of a hand cutting two tendons. In an incident at another mine a rock only about 18 to 20 inches in diameter and 6 inches thick slid off a rib severing a miner's leg.

Todilto President Warnock conceded that the first piece of rock seen by the inspection party was of the size described by Tanner. The 8 inch by 5 foot by 3 foot piece located some 20 to 25 feet to the rear of the "jumbo" was also as described by the inspector. Warnock testified that he personally barred down a small piece of that loose that hit the jumbo track. Warnock further admitted that there was "another big piece on the rib at the corner of the pillar" which he also thought "very definitely should have been brought down." This was located about 20 to 30 feet from the face. In an attempt to dispute the seriousness of the violation, Mr. Warnock also stated in a letter dated May 10, 1982, that, among other things, the piece on the right side of the track "was loose enough to be barred down and should have been" and that "this piece was, at the most, 50 pounds, and while it could have injured someone, it would not have been fatal." Warnock further admitted that "several larger pieces were barred off of the rib at two

different corners [and] they needed to be barred down and should have been." He argued only that they were not high enough on the rib to create a fatality."

Mine superintendent Ronald Ingimundson agreed with the other witnesses concerning the dimensions of the cited rock material. He agreed with Inspector Tanner that even a small rock weighing only 10 to 15 pounds falling from the roof of the mine could cause serious injuries.

Within this framework of essentially undisputed evidence, I have no difficulty in concluding that the violation cited was indeed quite serious. There indeed existed a reasonable likelihood that the hazard of a rock fall would occur resulting in injuries of a serious nature. The violation was accordingly "significant and substantial" and of high gravity. Secretary v. Cement Division, National Gypsum Co., 3 FMSHRC 822 (1981).

Mr. Warnock claims, in response to the allegations of negligence, that supervisory personnel did in fact instruct the miners at the beginning of the 8 a.m. shift to bar down the loose rock and that such work had commenced before other work in the mine. While there is no dispute that some rock had indeed been barred down before commencement of other work the undisputed evidence in this case also shows that much loose material still remained after supervisory personnel allowed other work to be performed. Accordingly, the operator was negligent.

In determining the appropriate penalty to be assessed in this case, I have also taken into consideration the evidence that the operator herein is small in size and had no prior violations. Indeed the record shows that Todilto had received several awards from the State of New Mexico in 1982 recognizing its "superior performance in promoting safety in the mining industry by achieving a zero frequency rate in their operations". In further mitigation Mr. Warnock pointed out that Todilto has never been cited for any violation since the citation and order at issue. However, because of the seriousness of this violation and the clear negligence of the operator, I find that a penalty of $350 is appropriate.

ORDER

The Todilto Exploration & Development Corporation is hereby ordered to pay a civil penalty of $350 within 30 days of the date of this decision.

Gary Melick
Assistant Chief Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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ALBERT J. DICARO, : Complaint of Discrimination

Complainant

: Docket No. WEST 82-113-D

v.

UNITED STATES FUEL COMPANY,

Respondent

DECISION

Appearances: David O. Black, Esq., for Complainant

Barry D. Lindgren, Esq., for Respondent

Before: Judge William Fauver

This proceeding was brought by the Complainant under section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., seeking relief for alleged acts of discrimination. The case was heard at Salt Lake City, Utah.

Having considered the contentions of the parties and the record as a whole,* I find that the preponderance of the reliable, probative, and substantial evidence establishes the following:

*The transcript contains a number of phonetic-interpretation errors. Most are self-evident and cause no difficulty in following the testimony. I have corrected and initialed one error, at page 313 of the transcript, where the correct word is "Socratic," rather than "autocratic."

FINDINGS OF FACT

1. At all pertinent times Respondent operated an underground coal mine, known as King Four Mine, near Hiawatha, Utah, which produced coal for sale or use in or substantially affecting interstate commerce.

2. Complainant was employed by Respondent from August 25, 1978, until October 23, 1981, with an absence on sick leave from May 5, 1980, to August 9, 1981, because of an injury in a mine accident.

3. The complaint charges that Respondent discriminated against Complainant because of safety complaints in that he was:

(a) Given a disciplinary warning on September 22, 1981.

(b) Suspended for 5 days without pay on October 13, 1981.

(c) Given a disciplinary warning on October 21, 1981.

(d) Suspended with intent to discharge on October 23, 1981, and this suspension was converted into a discharge.

4. A Section 103(g) complaint[1] signed by Albert Dicaro, dated September 10, 1981, was received by the Mine Safety and Health Administration (MSHA) on September 11, 1981, alleging that lighting on section equipment was not properly maintained. MSHA investigated the

complaint on September 22, 1981, and issued one citation on a roof bolting machine for an illumination violation of 30 CFR 75.179-3.

5. A Section 103(g) complaint signed by Larry Shiner, United Mine Workers of America District Safety Inspector, dated September 10, 1981,was received by MSHA on September 21, 1981. The complaint alleged that Albert Dicaro did not receive annual refresher training after his return to work on August 9, 1981. MSHA investigated this complaint on September 22, 1981. No citation was issued, since the inspector found that Dicaro had received the required training on September 19, 1981.

6. A Section 103(g) complaint signed by Albert Dicaro, dated September 28, 1981, requested an inspection of the sanders on the mantrips at the King Four Mine. MSHA investigated the complaint on September 30, 1981, and issued three citations on the sanders on mantrip jeeps.

7. A 103(g) complaint signed by Albert Dicaro, dated October 7, 1981, alleged float coal dust accumulations in the mine. MSHA investigated the complaint on October 9, 1981, and issued three citations for accumulations of coal dust.

8. On another occasion after his return to work on August 9, 1981, Complainant complained to a supervisor, Kent Powell, that there was inadequate rock-dusting for an area of about 2800 feet. Powell agreed that a small area (about 5 feet long) needed to be rock-dusted, but did

not agree that the "whole section" needed to be rock-dusted. Powell ordered the small area to be rock-dusted, using bags of rock dust that were near at hand, and told Complainant that if he wanted the rest rock-dusted he could hand-carry bags of rock dust and do the rock-dusting himself. Such work would have required Complainant to carry numerous heavy bags over an area of more than 2800 feet.

9. From August 9, 1981, until his discharge on October 23, 1981, Complainant's safety-complaint activities were common knowledge among his co-workers and mine management. Complainant's usual practice was to report a safety matter first to his supervisor and, if no corrective action was taken, he would file a complaint with MSHA. Mine management knew or had reasonable grounds to believe that the Section 103(g) complaints referred to in Fdgs. 4-7, above, were initiated by Complainant.

10. Complainant was appointed to the Mine Safety Committee around October 1, 1981.

11. Several weeks before his discharge, Complainant was threatened by a supervisor, Ken Powell, by words to the effect that Powell was going to have him fired. At another time, some weeks before Complainant's discharge, the mine foreman, Pat Jenkins, told Complainant that he wanted him to "leave the Federal Government out of company business," meaning that he did not want Complainant to file Section 103(g) complaints with MSHA and preferred that Complainant settle safety matters within the company.

12. From the time of Complainant's Section 103(g) complaints in September throughout the rest of his employment, mine management was hostile to Complainant because of his safety-complaint activites.

Warning on September 22, 1981

13. On September 22, 1981, the date that MSHA investigated the two Section 103(g) complaints dated September 10, 1981, Complainant's immediate supervisor, Jim Hanna, gave Complainant a disciplinary warning for "poor performance being that you broke between nine to twelve steels and put in ninteen roof bolts" on September 21 and 22, 1981. On September 22, Ken Powell, Maintenance Foreman, saw Complainant, a roof-bolt operator, break three drill steels in a period of about ten minutes, by moving the roof bolter while the drill steel was in the roof but still attached to the roof bolter. Powell reported this incident to Jim Hanna, who checked Complainant's records of broken steels and installed roof bolts for September 21 and 22, and issued the disciplinary warning.

14. On September 26, 1981, Complainant filed a Section 105(c) discrimination complaint with MSHA concerning the September 22 disciplinary warning. Complainant "dropped all charges" when the complaint was investigated by MSHA.

Suspension on October 13, 1981

15. On this date, at the start of the graveyard shift, Complainant and other miners told management personnel that the mantrip (equipment used to transport miners into and out of the mine) was unsafe because of inoperable warning bells or sanders. They requested that they be assigned other duties until the mantrip was repaired. Greg Mele, Foreman, ordered the crew to walk into the mine, about 2 to 2 1/2 miles. Complainant and his helper, George Brown, refused to walk into the mine, relying upon Complainant's interpretation of the following provision of the collective bargaining agreement (the "contract"):

> The Employer shall provide a safe mantrip for every miner as transportation in and out of the mines to and from the working section. [Art. III, Sec. O(8).]

16. About six members of the crew walked into the mine, two left on sick leave, and Complainant and George Brown refused to walk into the mine. Mele cautioned them that it would be direct insubordination to refuse to walk into the mine.

17. Complainant and George Brown continued to refuse to walk and were suspended for 5 days. Later, Brown's suspension was reduced to 3 days, on the ground that he did not have a prior disciplinary record, and Complainant was offered a reduction to 4 days suspension.

18. Complainant was aware that his refusal to walk into the mine was an act of direct insubordination. It was not a safety issue but a contract dispute; that is, there was no contention by Complainant that it was unsafe to walk into the mine. As a matter of custom and practice, at various times Respondent required miners to walk into the mine. The union's interpretation of the contract was that such practice was appropriate if done occasionally, and that there was no violation of the contract in this incident.

Warning on October 21, 1981

19. Following his 5-day suspension, Complainant returned to the mine on October 20, 1981, and took a sick day. On October 21, he worked a full shift. Early in the shift, Complainant phoned Roy Bonuales, Maintenance Foreman, and informed him the section had not been pre-shift examined. He based this statement on the fact that he could not find pre-shift markings in the section. Bonuales checked the examiners' book, told Complainant the section had been preshifted, and read to him the name and certificate number of the examiner. After this call, Complainant told Foreman Mele that he (Complainant) was not sure about the regulations concerning pre-shift examinations and would work that night under protest, but he would check into the law the next morning.

20. At the end of the shift, Complainant and his helper missed the mantrip. Their immediate supervisor, Martin Ernie, told them to walk

out of the mine. It would have taken about 5 to 8 minutes to walk out. Complainant refused to walk out of the mine. Ernie told him to walk out, and then left. After Ernie left, Complainant used the mine phone to call Pat Jenkins, Mine Foreman, and requested a ride for him and his helper. Jenkins provided a ride. When Ernie arrived on the surface he told Jenkins that Complainant had been insubordinate in refusing to walk out. Jenkins prepared a disciplinary warning to Complainant for insubordination and instructed Roy Bonuales to give it to Complainant when he reported to work the next day.

21. Bonuales gave Complainant the written warning before the start of the graveyard shift on October 22. Upon receipt of the warning, Complainant told Bonuales that he was going home on sick leave. Complainant testified that he had "sick days coming" and had personal business to take care of.

Complainant's Discussion with Union Safety Inspector

22. Sometime between the end of his shift on Octobr 21 and the beginning of his shift on October 23, Complainant consulted Larry Shiner, Safety Inspector for the International Union of UMWA, to discuss MSHA's regulations concerning pre-shift markings and a miner's safety rights when ordered to work in an area that does not have them. Shiner told him a miner would have two options: 1) work in the area and later file a safety grievance or 2) refuse to work in the area, requesting alternative duties, until a certified examiner makes a

pre-shift examination. Shiner explained the purposes of a pre-shift examination and pointed out a number of serious dangers that could be undetected without a proper pre-shift examination, including black damp, inadequate ventilation, unsafe roof or ribs, and methane gas.

Suspension with Intent to Discharge on October 23, 1981

23. Complainant worked the graveyard shift on October 23. His assignment was to roof-bolt in the first left entry of 8 North Section and then roof-bolt in the main entry of that section.

24. Complainant found pre-shift markings in the first left entry but thought there was a discrepancy between the time shown by his watch and the allowable time (within 3 hours) for making a pre-shift examination. He was on his way to the phone to call Bonuales, Foreman, about this question, when he saw Joe Montoya, a Mechanic, who told him he could find no pre-shift markings in the main entry. They both searched the main entry and could find no pre-shift markings there. Complainant then called Bonuales and requested a pre-shift examination of the main entry because there were no pre-shift markings there. Bonuales checked the examiners' book and told Complainant that the whole section, including the main entry, had been pre-shifted and read to Complainant the pre-shift report for the main entry. Complainant refused to do the roof-bolting work unless an examiner came in to pre-shift, and he requested alternative duties until the area was pre-shifted. Bonuales ordered him to perform his assignment but, after

Complainant's repeated refusal, Bonuales assigned him to other duties, telling him to go with his helper to assist in a belt move in the main entry.

25. Bonuales then phoned the pre-shift examiner, Ron Naccarato, a supervisor, who stated that he had pre-shifted the section and that the pre-shift markings in the main entry were on a brattice (ventilation curtain).

26. When Complainant arrived at the belt he checked an inspection pad at the tailpiece which did not show pre-shift markings for the graveyard shift. He called Bonuales back and told him that the belt had not been pre-shifted and that he would not work on the belt move without a proper pre-shift examination. Bonuales told Complainant that the belt did not have to be pre-shifted for the graveyard shift and ordered him to go to work. Complainant continued to refuse to work on the belt move and requested alternative duties. Bonuales told him that he had called Naccarato, who assured him that the main entry had been pre-shifted. Complainant still refused to work on the belt move and requested other available work until a proper pre-shift examination was made. Bonuales then ordered him out of the mine. At that point, Bonuales decided to suspend Complainant with intent to discharge. He told Mele to call Lee Heath, on the Mine Committee, because Complainant would be entitled to have a union representative present when Bonuales issued the suspension to him. Although Heath was also a member of the Safety Committee, Bonuales did not call him in that capacity and did not intend to discuss

or review the case with anyone before making a decision. He had already made up his mind to suspend Complainant with intent to discharge. The suspension was converted into a discharge, effective October 23, 1981.

DISCUSSION WITH FURTHER FINDINGS

Applicable Law

Section 105(c)(1) of the Act[2] -- its anti-discrimation provision -- is the centerpiece of a comprehensive statutory scheme to give miners an active role in the Act's enforcement for their safety and health protection.[3]

Section 105(c)(1) does not expressly provide a right to refuse to work because of safety or health hazards, but its legislative history and case law show that in certain circumstances such a right exists. Protected activity under this section includes a miner's refusal to work in conditions that he or she believes in good faith to be unsafe or unhealthful and a refusal to comply with work orders that are violative of the Act or a safety or health standard promulgated under the Act.

For example, the report of the Senate Committee that was responsible for drafting most of the 1977 Mine Act states in part:

Protection of Miners Against Discrimination

If our national mine safety and health program is to be truly effective, miners will have to play an active part in the enforcement of the Act. The Committee is cognizant that if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation. The Committee is also aware that mining often takes place in remote sections of the country, and in places where work in the mines offers the only real employment opportunity.

Section 10[5](c) ... prohibits any discrimination against a miner for exercising any right under the Act. It should also be noted that the class protected is expanded from the current Coal Act. The prohibition against discrimination applies to miners, applicants for employment, and the miners' representatives. The Committee intends that the scope of the protected activities be broadly interpreted by the Secretary, and intends to include not only the filing of complaints seeking inspection under section [103(g)] or the participation in mine inspections under section [103(f)] but also the refusal to work in conditions which are believed to be unsafe or unhealthful and the refusal to comply with orders which are violative of the Act or any standard promulgated thereunder or the participation by a miner or his representative in any administrative and judicial proceeding under the Act.

***

The listing of protected rights contained in section 10[5](c)(1) is intended to be illustrative and not exclusive. The wording of section 10[5](c) is to be construed expansively to assure that the miners will not be inhibited in any way in exercising any rights afforded by the legislation. *** The Committee intends to insure the continuing vitality of the various judicial interpretations of section 110 of the Coal Act which are consistent with the broad protections of the bill's provisions: See, e.g. Phillips v. IBMA, 500 F.2d 772; Munsey v. Morton, 507 F.2d 1202. The Committee also intends to cover within the ambit of this protection any discrimination against a miner which is the result of the safety training provisions . . . or the enforcement of those provisions . . . .

[S. Rep. No. 95-181, 95th Cong., 1st Sess., at 35-36 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 623-624 [(1978).]

The right to refuse to work was also discussed on the floor of the Senate:

> MR. CHURCH. I wonder if the distinguished chairman would be good enough to clarify a point concerning section 10[5](c), the discrimination clause.
>
> It is my impression that the purpose of this section is to insure that miners will play an active role in the enforcement of the act by protecting them against any possible discrimination which they might suffer as a result of their actions to afford themselves of the protection of the act.
>
> It seems to me that this goal cannot be achieved unless miners faced with conditions that they believe threaten their safety or health have the right to refuse to work without fear of reprisal. Does the committee contemplate that such a right would be afforded under this secton?
>
> MR. WILLIAMS. The committee intends that miners not be faced with the Hobson's choice of deciding between their safety and health or their jobs.
>
> The right to refuse work under conditions that a miner believes in good faith to threaten his health and safety is essential if this act is to achieve its goal of a safe and healthful work place for all miners.
>
> MR. JAVITS. I think the chairman has succinctly presented the thinking of the committee on this matter. Without such a right, workers acting in good faith would not be able to afford themselves their rights under the full protection of the act as responsible human beings. [Leg. Hist. at 1088-1089.]

Representative Perkins, the chief House conferee and chairman of the House Committee that drafted the House bill, stated during the customary oral report to the House describing the bill agreed to by the conference committee:

> Mr. Speaker, this legislation also provides broader protection for miners who invoke their safety rights. If miners are to invoke their rights and to enforce the act as we intend, they must be protected from retaliation. In the past, administrative rulings of the Department of Interior have improperly denied the miner the rights Congress intended. For example, Baker v. North American Coal Co., 8 IBMA 164 (1977) held that a miner who refused to work because he had a good faith belief that his life was in danger was not protected from retaliation because the miner had no "intent" to notify the Secretary. This legislation will wipe out such restrictive interpretations of the safety discrimination provision and will insure that they do not recur. [Leg. Hist. at 1356.]

The predecessor to the 1977 Mine Act included a provision prohibiting discrimination for "notif[ying] the Secretary or his authorized representative of any alleged violation or danger" (section 110(b) of the 1969 Federal Coal Mine Health and Safety Act). This provision was interpreted to protect miners from discharge or other retaliation if they notified their supervisor of an alleged unsafe or unhealthful condition and refused to work in that condition. Phillips v. Interior Board of Mine Operations Appeals, 500 F. 2d 772 (D.C. Cir. 1974); Munsey v. Morton, 507 F. 2d 1202 (D.C. Cir. 1974). In pointing out the need for this application of the statute, the court in Phillips stated:

> [T]he miners are both the most interested in health and safety protection, and in the best

> position to observe the compliance or non-compliance with safety laws. Sporadic federal inspections can never be frequent or thorough enough to insure compliance. Miners who insist on health and safety rules being followed, even at the cost of slowing down production, are not likely to be popular with [the] mine foreman or top management. Only if the miners are given a realistically effective channel of communications re: health and safety, and protection from reprisal after making complaints, can the Mine Safety Act be effectively enforced. [500 F.2d at 778.]

Citing Phillips as an example, the legislative history of the 1977 Act, quoted above, expresses an intention "to insure the continuing vitality of the various judicial interpretations of section 110 of the Coal Act which are consistent with the broad protections of the bill's provision. . . ."

The Commission has interpreted section 105(c)(1) as protecting a right to refuse to work if a miner has a good faith, reasonable belief that working conditions present a hazard to safety or health. See, e.g., Secretary of Labor ex rel. Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980), rev'd on other grounds, Consolidation Coal Company, v. Marshall, 663 F. 2d 1211 (3rd Cir. 1981); Robinettee v. United Castle Coal Company, 3 FMSHRC 803 (1981); and Dunmire and Estle v. Northern Coal Company, 4 FMSHRC 126 (1982).

Good faith simply means an honest belief that a hazard exists. A reasonable belief does not have to be supported by objective proof, but the evidence must show that the miner's perception of a hazard was a reasonable one under the circumstances. Unreasonable, irrational or completely unfounded work refusals are not protected by the statute. Robinette, supra, at 810 - 812.

In Robinette the Commission further explained the "reasonable belief" rule:

> The relatively stringent "objective, ascertainable evidence" test mentioned in Gateway is usually satisfied only by the introduction of physical evidence, "disinterested" corroborative testimony, and--not infrequently--expert testimony. Cf. NLRB v. Fruin-Conlon Construction Co., 330 F.2d 885, 890-892 (8th Cir. 1964), cited approvingly in Gateway, 414 U.S. at 387 (construing section 502). We think that such a test may be better suited to the broad scope of section 502, particularly where, as in Gateway, a union's contractually prohibited strike is involved. For while "objective, ascertainable" evidence is always welcome, it may not be readily obtainable in mining cases. Unsafe conditions can occur suddenly and in remote sections of mines; the miner in question may be the only immediate witness; and physical evidence may be elusive. Situations are also bound to arise where outward appearances suggest a dangerous condition which closer subsequent investigation does not confirm. Furthermore, we believe that such a test would chill the miner's exercise of the right to refuse work, an outcome inconsistent with the Act's legislative history favoring a broad right in a uniquely hazardous working environment. Miners should be able to respond quickly to reasonably perceived threats, and mining conditions may not permit painstaking validation of what appears to be a danger. For all these reasons, a "reasonable belief" rule is preferable to an "objective proof" approach under this Act.
>
> More consistent with the Mine Act's purposes and legislative history is a simple requirement that the miner's honest perception be a reasonable one under the circumstances. Reasonableness can be established at the minimum through the miner's own testimony as to the conditions responded to. That testimony can be evaluated for its detail, inherent logic, and overall credibility. Nothing in this approach precludes the Secretary or miner from introducing

> corroborative physical, testimonial, or expert evidence. The operator may respond in kind. The judge's decision will be made on the basis of all the evidence. This standard does not require complicated rules of evidence in its application. We are confident that such an approach will encourage miners to act reasonably without unnecessarily inhibiting exercise of the right itself.

[3 FMSHRC at 811 - 812, footnotes omitted.]

In Pasula, the Commission formulated the following test for "mixed motives" cases:

> We hold that the complainant has established a prima facie case of a violation of section 105(c)(1) if a preponderance of the evidence proves (1) that he engaged in a protected activity, and (2) that the adverse action was motivated in any part by the protected activity. On these issues, the complainant must bear the ultimate burden of persuasion. The employer may affirmatively defend, however, by proving by a preponderance of all the evidence that, although part of his motive was unlawful, (1) he was also motivated by the miner's unprotected activities, and (2) that he would have taken adverse action against the miner in any event for the unprotected activities alone. On these issues, the employer must bear the ultimate burden of persuasion. It is not sufficient for the employer to show that the miner deserved to have been fired for engaging in the unprotected activity; if the unprotected conduct did not originally concern the employer enough to have resulted in the same adverse action, we will not consider it. The employer must show that he did in fact consider the employee deserving of discipline for engaging in the unprotected activity alone and that he would have disciplined him in any event.

In W.B. Coal Co. v. Federal Mine Safety and Health Review Commission, et al (April 5, 1983), the Sixth Circuit rejected part of the test laid down by the Commission in Pasula. The court held that the "burdenshifting language in Pasula" is not a reasonable interpretation of the Act "because it conflicts with statutory language requiring proof of discrimination 'because of'

protected activities, 30 U.S.C. 815(c)(2), and language requiring the burden of proof to remain with the claimant, see 5 U.S.C. 556(C)." (Slip Op. at 14.) The Sixth Circuit distinguished the Supreme Court's decision in Mount Healthy Board of Education v. Doyle, 429 U.S. 274 (1977), on which the Commission's Pasula burdenshifting test is based, and found the Supreme Court's decision in Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981) to be apposite. In Burdine, the Supreme Court stated, in considering the requirements of a prima facie case under Title VII and the applicable burden of proof:

> The nature of the burden that shifts to the defendant should be understood in light of the plaintiff's ultimate and intermediate burdens. The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.
>
> * * *
>
> By establishing a prima facie case, plaintiff in effect creates a presumption that the employer unlawfully discriminated against the employee. If a trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.
>
> The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, non-discriminatory reason. The defendant need not persuade the court that it was actually motivated by the proferred reasons. It is sufficient if the defendant's evidence raises a genuine issue of fact . . . . [450 U.S. at 253-255.]

In W. B. Coal Co., the Sixth Circuit concluded:

> In summary, the proper test in considering mixed motives under the Mine Act is that, upon plaintiff's showing that an employer was motivated in any part by an employee's exercise of rights protected by the Act,

> the employer has the burden only of producing evidence of a legitimate business purpose sufficient to create a genuine issue of fact. The plaintiff, who retains the burden of persuasion at all times, may of course rebut the employer's evidence 'directly by persuading the trier of fact that a discriminatory reason more likely motivated the employer, or indirectly by showing that the employer's proffered explanation is unworthy of credence.' Burdine, 450 U.S. at 256. The plaintiff's ultimate burden is to persuade the trier of fact that he would not have been discharged 'but for' the protected activity. * * * [Slip Op. 15-16.]

The National Labor Relations Board adopted a test similar to the Mount Healthy test for labor discrimination cases, but the Circuit Courts appear split as to the burden-shifting portion of the test. See generally Note, Dual Motive Discharge, 58 Notre Dame L. Rev. 118 (1982), and cases cited in W.B. Coal (Slip Op. 10, fn 8). In declining to apply the Mount Healthy test to NLRA cases, the First Circuit discussed the difference between allocating the burden of proof to defendant and merely requiring defendant to rebut a presumption of discrimination (NLRB v. Wright Line, 662 F. 2d 899, at 905 (1st Cir. 1981), cert. denied, 455 U.S. 98):

> Professor Wigmore distinguishes between the burden of rebutting a prima facie case and the burden of persuading the trier of fact on the ultimate issue in a case by a preponderance of the evidence as follows:
>
> > '[A] prima facie case . . . need not be overcome by a preponderance of the evidence of greater weight; but the evidence needs only to be balanced, put in equipoise, by some evidence worthy of credence; and, if this be done, the burden of the evidence is met and the duty of producing further evidence shifts back to the party having the burden of proof . . . .'
>
> 9 Wigmore on Evidence [Sec.] 2487, at 282 (3d ed. 1940), quoting Speas v. Merchants' Bank & Trust Co., 188 N.C. 524, 125 S.E. 298 (1924).

* * *

> The imposition of this limited burden, however, does not shift to the employer the burden of proving that [a violation of the Act] has not occurred. Rule 301 of the Federal Rules of Evidence very aptly describes the scope of the duty involved in rebutting presumptions in civil cases as 'the burden of going forward with evidence to rebut or meet the presumption,' and distinguishes this duty from 'the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.' Fed. R. Evid. 301. Thus, the employer . . . has no more than the limited duty of producing evidence to balance, not to outweigh, the evidence produced by the general counsel. [NLRB v. Wright Line, 662 F.2d at 905.]

Direct evidence of discriminatory motivation is not often encountered; more typically, the only available evidence is indirect. In Secretary of Labor ex rel. Chacon v. Phelps Dodge Corporation, 3 FMSHRC 2508 (1981), the Commission identified the following factors as particularly relevant in proof of a circumstantial case:

1) management knowledge of the complainant's protected activity;

2) management hostility toward the protected activity;

3) coincidence in time between the protected activity and adverse action against the complainant; and

4) disparate treatment of the complainant

Factor 4) is not a sine qua non, but another factor to consider.

Section 7(c) of the Administrative Procedure Act,[4] which applies to adjudicatory hearings under the Mine Safety Act, sets minimum quality-of-evidence standards and a standard of proof. The provision directing the exclusion of "irrelevant, immaterial, or unduly repetitious evidence" and the requirement that the decision of the trier

of fact be "in accordance with" evidence that is "reliable" and "probative" mandate that the decision be premised on evidence of a certain level of quality. The further requirement that the decision be in accordance with "substantial" evidence implies quantity of evidence, and imposes the traditional preponderance-of-evidence standard. Steadman v. SEC, 450 U.S. 91, 98-101 (1980). This standard does not require proof to a certainty, proof beyond a reasonable doubt, or proof that is "clear and convincing" (Steadman, at 95, 99). Proof by a preponderance means only that proof that leads the trier of fact to find that existence of a contested fact is more probable than its nonexistence. Gardner v. Wilkinson, 643 F.2d 1135, 1137 (5th Cir. 1981); and see generally McCormick, Evidence 794 (2d ed. 1972). The burden is not met, however, by evidence that creates no more than a suspicion of the existence of the fact.

"Substantial evidence," when used to limit the scope of review -- for example, in section 10(e) of the APA, limiting judicial review of agency decisions, or in section 113(d) of the Mine Safety Act, limiting the Commission's review of administrative law judges' decisions -- means "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" Steadman, at 99-100, quoting Consolo v. FMC, 383 U.S. 607, at 620 (1966).

Warning on September 22, 1981

Complainant's proof made a prima facie showing of discrimination as to this incident, in that: the warning was given on the same day that MSHA investigated two section 103(g) complaints initiated by Complainant (one signed by Shiner in Complainant's behalf), management knew that he was the source of the complaints (or had reasonable grounds

to believe he was), the record does not show prior discipline of a roof bolter for either breaking steel drills or installing too few roof bolts, and performance standards for the job of roof bolter were not clearly established either by written standards or oral training. However, Respondent proved by a preponderance of the evidence that on September 22 Complainant was observed breaking three drill steels by conduct (moving the roof bolter while a drill steel was connected to the bolter and still in the roof) showing either a deliberate intention to break the drills or gross negligence in operating the equipment. Complainant did not persuasively rebut this evidence. He offered only an indirect explanation for the breakage, saying that reconditioned steels broke more easily than new steel, but he was uncertain whether he was working with reconditioned or new steel; he did not effectively rebut Respondent's evidence, which I credit, that he was working with new steel on both dates, and his testimony was not probative in rebutting Powell's eye-witness testimony about his misuse of the equipment. As to the number of roof bolts installed by Complainant (19 on two shifts), Respondent did not establish a recognized performance standard, but Complainant's testimony that, depending on conditions, a bolter would install from 20 to 50 bolts a shift and that he had put in as many as 100 on one shift supported Respondent's evidence that Complainant's installation of only 19 bolts in two shifts was poor performance.

I find that the preponderance of the evidence establishes legitimate grounds for the warning on September 22 and does not establish a discriminatory motive. Complainant has not shown, by a preponderance of the evidence, a reasonable probability that, but for

his prior safety complaints, the September 22 warning would not have been issued.

Five-Day Suspension on October 13, 1981

Complainant did not meet his burden of proving discrimination as to this incident.

At the start of his shift on October 13, Complainant and some other miners complained that the mantrip cars were unsafe because of defective or missing bells or sanders. After some discussion, the employees rejected management's proposal that time be allowed to abate the condition and that they ride on the mantrips pending abatement. Greg Mele, Foreman, then directed the crew to walk into the mine because transporation was not available. Complainant and his helper refused to walk in, based upon Complainant's opinion that the contract gave them a right to a mantrip ride. Some miners walked in, some went home on sick leave, and Complainant and George Brown refused to walk. Both were suspended for insubordination. Complainant testified that his refusal to walk into the mine was not a safety issue. The preponderance of the evidence establishes a legitimate basis for the discipline, and does not establish a discriminatory motive.

Warning on October 21, 1981

Following his five-day suspension for refusal to walk into the mine, Complainant returned to the mine on October 20 and, instead of reporting to work, took a sick day and went home. The next day he was assigned to roof bolt in A-seem (9 North Section). After setting up his machine, Complainant looked for the pre-shift markings and could find none. He then used the mine phone to call Bonuales, Foreman, and informed him that the section had not been pre-shifted. Bonuales

checked the examiners' book and told Complainant that the section had been pre-shifted, and read to him the examiner's report and gave him the examiner's name and certificate number. After this, Greg Mele, Foreman, had a conversation with Complainant concerning the pre-shift markings. Complainant stated that he did not understand the law regarding pre-shift markings and would work that night under protest, but would check into the law the following morning.

At the end of his shift, Complainant and his helper missed the mantrip. Their immediate supervisor, Martin Ernie, told them to walk out of the mine. Walking would have taken about 5 to 8 minutes. Complainant testified that he refused to walk out and "asked Martin Ernie for a ride. I asked him to let us take the motor out because it was because of him that we missed our ride." 7/13 Tr. 52. Ernie testified that, "I don't remember the reason, but we was late leaving the section that day, and Albert had another worker with him. *** I was on a motor and we're only allowed to have two people ride on the motor, so we was down at the mouth of A-seem at the end of the shift, and I told them to go ahead and walk out. *** He refused. He said that he was not going to walk out. And I told him that I wanted him to walk out, and he said no, he would not walk out. He was going to get a ride. And I says, 'Well, I want you to walk outside and I'll see you outside.' And I went ahead on the motor and headed towards the outside." 7/13 Tr. 79-80. Complainant then used the mine phone to call Pat Jenkins, Mine Foreman, and told him he and his helper needed a ride. Jenkins provided them a ride. Ernie overheard Complainant's call to Jenkins and on the surface reported to Jenkins that he had told Complainant to walk out and

that Complainant had refused. Jenkins then wrote Complainant a disciplinary warning for insubordination. The written warning stated that due to Complainant's refusal to follow a direct order on the first day back to work after a five-day suspension, he was being put on notice that the next instance of insubordination would result in suspension subject to discharge.

I find that the preponderance of the evidence shows a legitimate basis for the disciplinary warning and does not establish a discriminatory motive.

Suspension and Discharge on October 23, 1981

On October 23, 1981, Complainant worked on the graveyard shift, his usual shift. His assignment was to roof-bolt in the first left entry of 8 North Section and then to roof-bolt in the main entry of that section.

Despite a thorough search in the main entry, Complainant and another miner could not find markings of a pre-shift examination in the main entry. Complainant telephoned Bonuales, the outside foreman, to request a pre-shift examination of that area. Bonuales checked the examiners' book and told Complainant that the whole section had been pre-shifted, including the main entry, and he read him the examiner's report of a pre-shift examination of the main entry. Bonuales then ordered Complainant to perform his roof-bolting assignment. Complainant refused to roof-bolt unless an examiner came in to conducted a proper pre-shift examination of the main entry, and requested an assignment to other duties until such an examination was made. Bonuales finally agreed to an assignment of alternative duties, and told Complainant to go with his helper to assist in a belt move in the main entry.

After arriving at the belt, Complainant checked an examination pad near the tailpiece and saw no evidence of a pre-shift examination of that area. He then called Bonuales and told him that the area needed to be pre-shifted. Bonuales told him that the belt did not have to be pre-shifted for the graveyard shift, and ordered Complainant to go to work, but Complainant refused unless an examiner came in to make a pre-shift examination; he requested alternative duties until this was done. Part of Complainant's safety complaint to Bonuales, stated in this phone conversation, was the point that the belt was to be moved into the main entry area where Complainat had found no pre-shift markings, that is, the same pre-shift problem Complainant had just talked to Bonuales about in the prior phone call. Another part of his safety complaint, stated in the second phone conversation with Bonuales, was Complainant's contention that, if one working face in a section has not been pre-shifted, the entire section has not been properly pre-shifted. Bonuales again tried to get Complainant to go to work, but Complainant refused and requested alternative duties. Bonuales then ordered him out of the mine. It was at this point that Bonuales decided to suspend Complainant with intent to discharge. He did not plan to discuss the matter further with anyone else. He called his supervisor to tell him of his decision. He also arranged to have a member of the Mine Committee called, because Complainant would be entitled to union representation when the suspension was issued. This call, to Heath, was not for the purpose of discussing Complainant's safety complaint, but simply a formality of notifying the Mine Committee that a miner was about to be suspended with intent to discharge.

There is no question that pre-shift markings were not present in the main entry. There was a notation chalked on a brattice showing an examination for the previous shift, but there were no markings of a date and time for a pre-shift examination for the graveyard shift. Nor were there smudge marks that might indicate that pre-shift markings had been made but had been rubbed away. I find that the preponderance of all the evidence shows that pre-shift markings were not made in the main entry area for the October 23, 1981, graveyard shift. I do not credit the examiner's testimony that he had made pre-shift markings there.

It is not necessary to resolve whether or not the main entry had actually been pre-shifted for Complainant's shift. The evidence that the pre-shift markings could not be found, despite a thorough search, is sufficient to establish a protected activity in Complainant's refusal to work without physical, on-the-site evidence of a pre-shift examination of the area where he was required to work. The absence of pre-shift markings in the main entry also entitled Complainant to refuse to assist in the belt move, which would have required him to work in the main entry of 8 North Section.

Mine management, through the testimony of Mr. Vrettos, acknowledged that a miner has the right to refuse to work in an area that has not been pre-shifted, but contends that Complainant was required to accept Bonuales' assurance that a pre-shift examination had been made based on the examiner's book and the examiner's statement to Bonuales.

I conclude, however, that Complainant was entitled, without retaliation, to refuse to work in the main entry until there was a proper pre-shift examination of that area as evidenced by on-the-site pre-shift markings. He was also entitled to refuse to perform the

belt-move assignment, which would have involved moving the belt into the main entry of 8 North Section. It is not necessary to resolve whether or not the belt tailpiece was a part of the 8 North Section, or whether the belt was required to be pre-shifted before moving the belt on the graveyard shift. It is sufficient that Complainant was being ordered to perform work that would take him into the main entry of 8 North Section and that that area did not have markings of a pre-shift examination.

I find that Complainant had a reasonable, good faith belief that he confronted a threat to his safety when he refused to perform the roof-bolting assignment and later when he refused to assist in the belt move, because each of these asignments would require him to work in the main entry of 8 North Section, which did not have markings of a pre-shift examination. The danger he reasonably perceived was the uncertainty of working in an area that had not been properly preshifted.

Mine management was in error in minimizing the importance of preshift markings and in requiring that Complainant point to actual present dangers as the only basis on which it would permit him to refuse to work in the main entry. The mandatory safety standard for preshift examinations[5] requires that an examiner be trained and certified to conduct a series of specific, expert, and technical examinations, and have the necessary tools and equipment to conduct them. Among other important safety duties, the preshift examiner must examine for accumulations of methane and oxygen deficiency, examine seals and doors, test ventilation and the roof, face and ribs, and examine active roadways and travel ways, belt conveyors and other areas to ensure that the working area is free of detectable hazards and that various mandatory safety and health standards are being complied with before men

are taken into the area to work. The preshift regulation also requires that the examiner make preshift markings in each area inspected. This requirement is an important safeguard to ensure that the miners' safety and health are being properly protected by compliance with the statute and regulations. Complainant was entitled to see that this safeguard -- placing preshift markings in the area inspected -- was met before he could be required to work in the area. Complainant had neither the training, certification, nor the necessary tools and equipment to carry out the preshift examination himself. It was not his obligation to inspect the area and point out dangers to his supervisor. Indeed, miners should not enter a working area that has not been preshifted. Therefore, Complainant was protected by section 105(c)(1) in raising a safety complaint (failure to make a proper preshift examination as evidenced by appropriate preshift markings) to his supervisor and in refusing to work in that area.

Respondent introduced a decision by an arbitrator upholding Complainant's discharge. However, this turns on issues under the contract and not the rights created by section 105(c)(1) of the Act. Work-refusal rights under the contract are limited to a narrow class of cases in which a miner is ordered to work under "conditions he has reasonable grounds to believe to be abnormally and immediately dangerous to himself beyond the normal hazards inherent in the operation which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated" (Art. III, Section (i)). However, section 105(c)(1) of the Act extends protected activites far beyond this test and is the relevant standard here. The arbitration

decision is not binding in this proceeding. See, e.g., Alexander v. Gardner-Denver Company, 415 U.S.36, 60 (1974).

The discharge on October 23 was not a "mixed motives" case. Complainant's refusal to work was a protected activity under section 105(c)(1) of the Act and his suspension and discharge were in retaliation of this protected activity. The evidence thus establishes discrimination in violation of section 105(c)(1). I find, also, that the evidence preponderates in showing a background of management hostility towards Complainant because of his safety-complaint activities, beginning with his section 103(g) complaints in September and continuing up to the time of his discharge; this evidence additionally raises a reasonable inference of specific hostility toward him because of his safety complaints on October 23, 1981.

CONCLUSIONS OF LAW

1. The judge has jurisdiction of this proceeding.

2. Complainant did not meet his burden of proving a violation of Section 105(c)(1) of the Act with the respect to any of the following incidents:

(a) The disciplinary warning on September 22, 1981.

(b) The suspension for 5 days without pay on October 13, 1981.

(c) The disciplinary warning on October 21, 1981.

3. Respondent violated Section 105(c)(1) of the Act on October 23, 1981, by suspending Complainant with intent to discharge and by discharging him effective that date.

4. Complainant is entitled to reinstatement, back pay with interest, and costs, including a reasonable attorney's fee and other litigation costs reasonably incurred in connection with this proceeding.

Other appropriate relief may be considered in formulating a final order.

All proposed findings of fact and conclusions of law inconsistent with the above are rejected.

PENDING A FINAL ORDER

The judge retains jurisdiction of this proceeding pending the issuance of a final order granting relief. Counsel for the parties should meet in an effort to stipulate the amounts due and other elements of an appropriate order. Such stipulation will not preclude Respondent's rights to seek review of this decision. Complainant shall have 10 days from receipt of this Decision to file a proposed order granting relief. Respondent shall have 10 days to reply to Complainant's proposed order. If necessary, a further hearing will be held on issues concerning relief.

William Fauver

WILLIAM FAUVER
ADMINISTRATIVE LAW JUDGE

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FOOTNOTES

1/ Section 103(g)(1) of the Act provides:

> (g) (1) Whenever a representative of the miners or a miner in the case of a coal or other mine where there is no such representative has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists, or an imminent danger exists, such miner or representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, signed by the representative of the miners or by the miner, and a copy shall be provided the operator or his agent no later than at the time of inspection, except that the operator or his agent shall be notified forthwith if the complaint indicates that an imminent danger exists. The name of the person giving such notice and the names of individual miners referred to therein shall not appear in such copy or notification. Upon receipt of such notification, a special inspection shall be made as soon as possible to determine if such violation or danger exists in accordance with the provisions of this title. If the Secretary determines that a violation or danger does not exist, he shall notify the miner or representative of the miners in writing of such determination.

2/ Section 105(c)(1) of the Act provides:

> (c) (1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

3/ Other provisions establishing an active role of miners in the enforcement of the Act include: section 103(g)(1) (right of miners' representative to obtain a government inspection whenever he or she "has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists, or an imminent danger exists"); section 103(f) (permitting miners' representative to accompany MSHA inspectors on all inspections); section 103(c) (requiring government regulations permitting miners to observe the monitoring or measuring of toxic materials and harmful physical agents); section 103(d) (interested persons' access to accident reports); section 302(a) (miners' access to roof control plan); sections 303(d)(1), (f), (g) and (w) (interested persons' access to records of operator's safety and health examinations); section 305(e) (miners' access to map of electrical system); section 305(g) (miners' access to records of operator's electrical examinations); section 312(b) (miners' access to confidential mine map); sections 107(e)(1) and 105(d) (miners' right to challenge the modification or termination of withdrawal orders and to contest the reasonableness of the abatement time allowed by a citation or modification thereof); section 5(d) of the Act and the Commission's rules of procedure (permitting miners to participate in proceedings under section 105 of the Act).

4/ Section 7(c) of the APA provides (5 USC 556(d)):

> Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.

5/ 30 CFR 75.303(a) provides:

(a) Within 3 hours immediately preceding the beginning of any shift, and before any miner in such shift enters the active workings of a coal mine, certified persons designated by the operator of the mine shall examine such workings and any other underground area of the mine designated by the Secretary or his authorized representative. Each such examiner shall examine every working section in such workings and shall make tests in each such working section for accumulations of methane with means approved by the Secretary for detecting methane, and shall make tests for oxygen deficiency with a permissible flame safety lamp or other means approved by the Secretary; examine seals and doors to determine whether they are functioning properly; examine and test the roof, face, and rib conditions in such working section; examine active roadways, travelways, and belt conveyors on which men are carried, approaches to abandoned areas, and accessible falls in such section for hazards; test by means of an anemometer or other device approved by the Secretary to determine whether the air in each split is traveling in its proper course and in normal volume and velocity; and examine for such other hazards and violations of the mandatory health or safety standards, as an authorized representative of the Secretary may from time to time require. Belt conveyors on which coal is carried shall be examined after each coal-producing shift has begun. Such mine examiner shall place his initials and the date and time at all places he examines. If such mine examiner finds a condition which constitutes a violation of a mandatory health or safety standard or any condition which is hazardous to persons who may enter or be in such area, he shall indicate such hazardous place by posting a "danger" sign conspicuously at all points which persons entering such hazardous place would be required to pass, and shall notify the operator of the mine. No person, other than an authorized representative of the Secretary or a State mine inspector or persons authorized by the operator to enter such place for the purpose of eliminating the hazardous condition therein, shall enter such place while such sign is so posted. Upon completing his examination, such mine examiner shall report the results of his examination to a person, designated by the operator to receive such reports at a designated station on the surface of the mine, before other persons enter the underground areas of such mine to work in such shift. Each such mine examiner shall also record the results of his examination with ink or indelible pencil in a book approved by the Secretary kept for such purpose in an area on the surface of the mine chosen by the operator to minimize the danger of destruction by fire or other hazard, and the record shall be open for inspection by interested persons.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAY 26 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. WEST 82-114-M A/O No. 42-01150-05017
v.	:	Lucky Strike Mine
PLATEAU RESOURCES LIMITED, Respondent	:	

DECISION

After denial of the operator's interlocutory appeal from the trial judge's decision of March 30, 1983, 5 FMSHRC 605, this matter was set for an evidentiary hearing in Salt Lake City on May 19, 1983.

When the operator's presentation created a credibility gap that could not be resolved without additional witnesses, the trial judge ordered production of two additional eyewitnesses. After inquiry, counsel for the operator advised these witnesses were no longer employed by the operator and had accepted other employment at points distant to the place of hearing.

At the suggestion of the trial judge the hearing was recessed to afford the parties an opportunity to discuss settlement. Thereafter, the parties jointly moved to withdraw the challenge to the validity of the citation and to settle the explosives violation charge by increasing the amount of the penalty initially proposed from $32 to $500.

After a consideration of the parties' motion in light of the record made, the trial judge granted the motion and ordered the operator to pay the amount of the penalty agreed upon, $500, within ten days.

Accordingly, it is ORDERED that the bench decision issued May 19, 1983, be, and hereby is, CONFIRMED, that the operator pay the agreed upon penalty, $500, on or before May 31, 1983, and that subject to payment the captioned matter be DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

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